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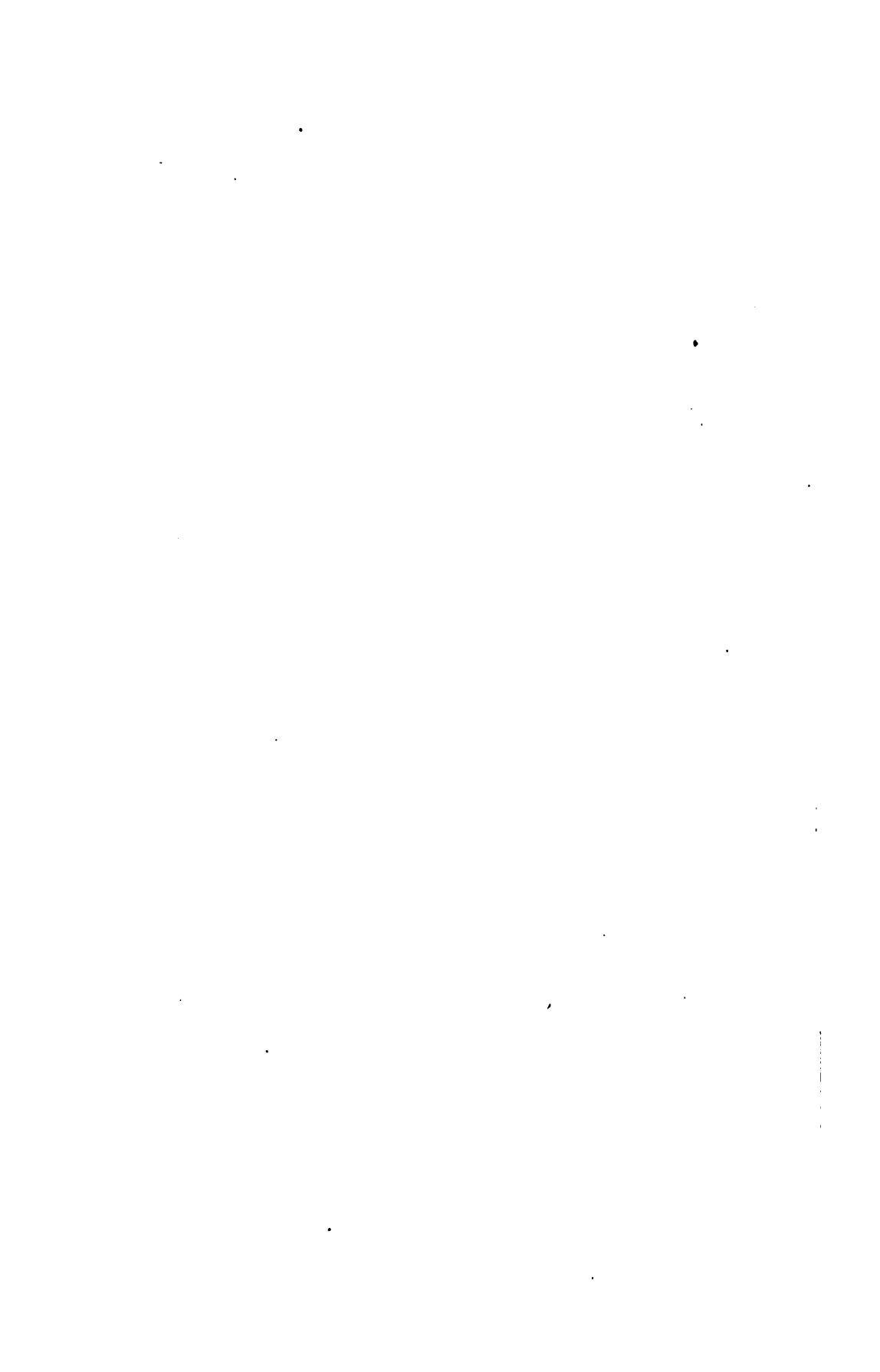
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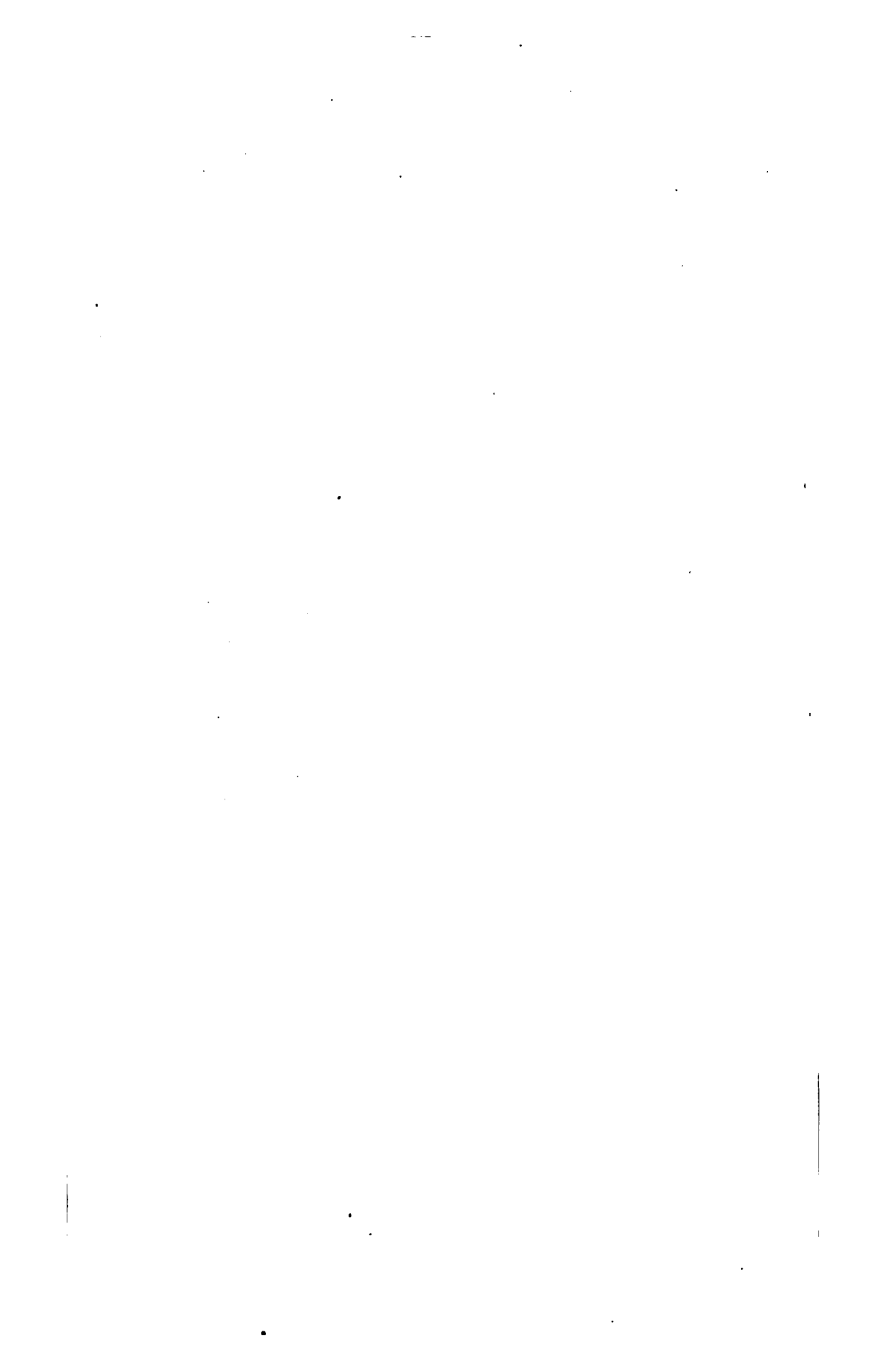
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES CITED
AND AN INDEX.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XXXVI.

CONTAINING THE CASES DECIDED AT THE MAY TERM,
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OF THE
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DURING THE TIME OF THESE REPORTS.

ALEXANDER C. DOWNEY, LL. D.*

JAMES L. WORDEN, LL. D.†

SAMUEL H. BUSKIRK, LL. D.

JOHN PETTIT, LL. D.

*Chief Justice at the May Term, 1871.

†Chief Justice at the November Term, 1871.

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ADDITIONAL RULES
OF THE
SUPREME COURT OF INDIANA.

RULE 33.* In any case pending in this court and not distributed, any attorney or firm of attorneys, representing either party, may be allowed to take the record and papers out of the clerk's office for any proper purpose connected with such cause, on giving a receipt therefor in such form as the clerk may adopt, in which shall be specified the time during which such record and papers may be kept. On failure to return such record and papers within the time stated, the attorney or firm of attorneys so failing shall receive no other record or papers while so in default, and the clerk shall immediately issue an order against him or them to show cause why such record and papers have not been returned. On failure to show sufficient cause and return such record and papers, such attorney or attorneys shall pay the costs of the order and service thereof, and an attachment may issue as for a contempt.

RULE 34.† After a cause has been decided, neither the record nor the opinion shall be taken from the office of the clerk, except by a judge of the court or by the official reporter, and the clerk is required to enforce this rule.

*Adopted January 13th, 1873.

†Adopted February 21st, 1873.

**For previous decisions of the Supreme Court of this State,
overruled and explained, see INDEX, tit. CASES OVERRULED
AND EXPLAINED.**

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1871, IN THE FIFTY-FIFTH YEAR
OF THE STATE.

LA FOLLETT v. AKIN.

RECEIVER.—*Suit against Assignee.*—*Statute.*—Action by a receiver against the assignee, under an assignment for the benefit of creditors, of a judgment debtor, to recover damages resulting to a judgment creditor for the failure of the assignee to properly discharge his duty under the trust.

Held, that the action could only be sustained at the suit of the party injured, or his assigns.

Held, also, that the 205th section of the code (2 G. & H. 153) only authorizes the court to empower the receiver to bring suit where the party whose effects he receives could have brought the action, save, perhaps, in exceptional cases.

APPEAL from the Sullivan Circuit Court.

WORDEN, J.—The firm of Knisely, Stout & Kellbogg recovered judgments against William F. Richie, in the court of common pleas and circuit court of Floyd county, and having

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La Follett v. Akin.

issued executions thereon, which were returned *nulla bona*, they instituted proceedings thereon, "supplementary to execution," in the Floyd Circuit Court, and such proceedings were had thereon as that La Follett, the appellant herein, was, by the last named court, appointed as receiver for said William F. Richie. It was ordered by said Floyd Circuit Court, that the receiver aforesaid be empowered to sue for and recover the property and assets of said Richie, or the value thereof, where the same had been wrongfully and fraudulently disposed of by any person or persons, and bring the property, or the proceeds thereof, into court, to be applied to the satisfaction of the said judgments.

Under the above appointment, La Follett commenced this action against the appellee, setting out in his complaint, in substance, the foregoing facts, and averring further, that on or about the first of April, 1861, Richie, being in embarrassed circumstances and unable to pay all his debts, assigned and transferred all his property of every kind and description—consisting of cash and certain notes received by him upon the sale of a stock of goods, and other notes and accounts due him from divers persons, all of which are set forth and described in schedules "A" and "B," filed with the complaint—to the said Ransom W. Akin, in trust, for the payment, first, of certain debts which the said Richie owed said Akin, amounting to about seventeen hundred dollars, and certain notes upon which Akin was surety, amounting to about four thousand eight hundred and fifty dollars, and the surplus, after the payment of said debts and notes, to be applied to the payment of other creditors of said Richie in a *pro rata* proportion, according to the amount of their respective debts; that Akin accepted the trust, took possession of the assigned property, and undertook to appropriate it to the discharge of the debts of Richie in the manner aforesaid; that the property described in schedule "A" was of the value of twenty-one hundred dollars, and that described in schedule "B" was of the value of eleven thousand two hundred and thirty dollars, all of which came to the hands of Akin

by virtue of the assignment; that he did not pay or offer to pay to Knisely, Stout & Kellogg any part of the proceeds of the assigned property, nor did he give them any notice, nor had they any notice, of the assignment or the terms or purposes thereof, until after the 9th of April, 1863, when they commenced their proceedings supplementary to execution; that as soon as said Knisely, Stout & Kellogg were informed of the terms and conditions of said assignment, they agreed and were ready and willing, and have at all times since been ready and willing, to receive their portion of said assigned property according to the terms and conditions of the assignment, and are still ready and willing to do so; but that Akin did wrongfully and fraudulently keep and dispose of the property and the proceeds thereof, in this, to wit: that immediately after receiving and taking into his possession the property, he placed the same in the hands of one Henry Crawford, his attorney, to be used and disposed of as the said Crawford should think proper, and, without giving any notice of the assignment to Knisely, Stout & Kellogg, who were then creditors of said Richie, or paying or offering to pay them any portion of the proceeds of said assigned property, did wrongfully and fraudulently permit the said Crawford to assign and transfer and pay all the cash notes mentioned in schedule "B," immediately after he had received possession of the same, to certain other creditors of said Richie, so that the same was wholly exhausted without Knisely, Stout & Kellogg receiving or having any opportunity to receive any part thereof; said notes in schedule "B" being all good and equal to cash, and being so treated and disposed of by Akin and his attorney; that Akin did further wrongfully and fraudulently dispose of the property, in this, that though the notes and amounts specified in schedule "A" were, at the time, of considerable value, to wit, of the value of twenty-one hundred dollars, and were so estimated by both Richie and Akin at the time of the assignment, yet Akin failed and neglected to take any measures or institute any proceedings to collect the same and apply the

proceeds to the purposes of the trust; but as soon as he had disposed of the property mentioned in schedule "B," and had procured payment of his own debt and the debts for which he was surety for said Richie, he wrongfully and fraudulently, and in total disregard of the duties of his trust, gave up and abandoned the same, and made no effort to collect the residue, but delivered up, or suffered Richie to resume and take possession thereof, being all the notes and accounts specified in schedule "A;" and both Akin and Richie failed to make any effort to collect the same until they came to the hands of the receiver, when, by lapse of time, they had become worthless and of no value whatever; that Richie, at the time he made the assignment, was, and ever since has been, utterly insolvent, having no property of any kind subject to execution.

Prayer that Akin be required to account for the property assigned to him by Richie, and that he be required to pay to the plaintiff, for the use of Knisely, Stout & Kellogg, their just proportion of the proceeds of the property, and for other proper relief.

The complaint is quite lengthy, but we have condensed it somewhat, leaving out nothing material to the development of the ground on which the decision of the cause must rest.

A demurrer, assigning for cause, amongst other things, that the complaint did not state facts sufficient, etc., was sustained to the complaint. Exception was taken, and final judgment rendered for the defendant.

It will be seen, by an examination of the complaint, that there are two particulars in which Akin is charged with a violation of his duty as trustee under the assignment: 1. In appropriating the notes, etc., described in schedule "B" to the payment of claims other than those of Knisely, Stout & Kellogg. Of the claims thus paid, he had a right, however, by the terms of the assignment, to pay himself in full, and also the claims on which he was surety for Richie. 2. In surrendering up to Richie the notes, etc., described in schedule "A," without any effort to collect the same. The

claims mentioned or described in schedule "A," it seems, finally went into the hands of the receiver, so that all that can be claimed against Akin in respect to them is the damage resulting from his failure to make the proper effort to collect them instead of passing them back to Richie. In short, the claim against Akin is the damage resulting to Knisely, Stout & Kellogg from the failure of Akin to take the proper steps to collect the claims described in schedule "A," and from his alleged misappropriation, in part, of the claims described in schedule "B." With this statement of the ground of complaint against Akin, we are prepared to consider the decision below on the demurrer.

There is no allegation in the complaint that any list of the creditors of Richie was given to Akin, nor does it appear that at the time he disposed of the claims described in schedule "B," or the proceeds thereof, in payment of debts other than those of Knisely, Stout & Kellogg, or at the time he surrendered up to Richie the notes described in schedule "A," he had any knowledge of the existence of the claims of Knisely, Stout & Kellogg against Richie. If Akin did what he is charged with having done, without any notice of the claims of Knisely, Stout & Kellogg, the query arises, whether he could be held liable, in any manner, for not providing for their claims; but we decide nothing upon this point, as there is another objection, as we think, fatal to the complaint.

The point is made by the appellee, that the assignment is void, for the reason that it does not comply with the act of 1859 on the subject. 1 G. & H. 114. We, however, decide nothing upon this point.

We are of opinion that the complaint was defective, and the demurrer thereto properly sustained, for the reason that for the injury complained of the receiver of Richie cannot maintain an action; but that if, from any wrongful act or omission of Akin in the discharge of his duties as such trustee, an injury has been done to Knisely, Stout & Kellogg, they must sue therefor themselves or transfer the right

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of action to some one else. Richie himself could, from the facts stated in the complaint, have had no right of action against Akin, and, as a general proposition, subject, perhaps, to some exceptions, the receiver of the effects of a party cannot maintain an action where the party himself could not. See *Hyde v. Lynde*, 4 N. Y. 387. It is sometimes said, a little loosely, that a receiver represents all the parties. This is well explained in the case of *McHarg v. Donnelly*, 27 Barb. 100, where HOGEBROOM, J., in delivering the opinion of the court, says: "I am aware that it has been held that for certain purposes—for example, setting aside a fraudulent assignment—the receiver represents the creditors of the judgment debtor. But he is so characterized simply in contradistinction to his being the representative of the judgment debtor. He is said to represent the creditors, because he represents the estate of the judgment debtor, in which the creditors are interested, as well as the debtor himself."

The statute relied upon by the appellant provides, that a receiver may be appointed in an action "by a creditor, to subject any property or fund to his claim," and "in such other cases as may be provided by law; or when, in the discretion of the court, it may be necessary to secure ample justice to the parties." 2 G. & H. 151, 152. We do not question the propriety or the regularity of the appointment of the appellant as receiver; but it does not follow that because he was properly and regularly appointed, he can maintain this action. The 205th section of the statute (2 G. & H. 153) provides, that "the receiver shall have power, under the control of the court, to bring and defend actions," etc. This section does not authorize the court to empower the receiver to bring an action in any and all cases, but only in cases where the party whose effects he receives could have brought the action, save, perhaps, some exceptional cases. In the case before us, the action is brought to recover damages resulting to Knisely, Stout & Kellogg for the failure of Akin, the appellee, to properly discharge his duties under the trust alleged, and we are clearly of the opinion that it

can only be brought by those who have been damnified or their assigns.

The judgment below is affirmed, with costs.

T. L. Smith, M. C. Kerr, and S. Coulson, for appellant.

J. M. Hanna, for appellee.

RHODES and Another v. GREEN and Another.

FRAUDULENT CONVEYANCE.—*Innocent Purchaser.—Notice.—Creditor.—Actions.—Purchase-Money.*—Where lands have been conveyed to defraud creditors, to an innocent purchaser, who, however, while owing the purchase-money, or part thereof, has notice of the fraud, creditors may bring an action to set aside the conveyance as fraudulent and subject the land to the payment of debts, to the extent of the unpaid purchase-money; and they are not limited to proceedings supplemental to execution.

FRAUD.—*Evidence.*—Fraud may be found from circumstances as well as positive evidence.

RESULTING TRUST.—*Cestui que trust.*—Where lands are purchased by one with the money of another, and the conveyance is made in the name of the former, without the consent of the latter, the lands are subject to a resulting trust in favor of the latter, and are not liable for the debts of the former.

CREDITOR.—*Warranty Deed.—Eviction.—Breach of Warranty.—Time.*—Where the grantee of a warranty deed of real estate incumbered by judgments against former owners is evicted by the purchaser at sheriff's sale under such prior judgments, he is a creditor of his grantor, and is such from the date of the deed, and may sue to set aside conveyances made by his grantor to defraud creditors.

EVIDENCE.—On the trial of an action to set aside fraudulent conveyances, it is proper that the plaintiff should introduce evidence to prove who paid the purchase-money; how it was paid, and who were concerned in having the deed made, and to identify the deed with the transaction.

SUPREME COURT.—*Presumption.—Examination of Witnesses.*—The Supreme Court will presume—the contrary not being shown—that there was a good reason justifying the court below in allowing plaintiff's witness to repeat, after the close of the defendant's evidence, what he had previously sworn to.

SAME.—*Exceptions.—Evidence.*—The Supreme Court will not consider general objections to the introduction of evidence where no particular grounds are pointed out.

36	7
137	575
36	7
190	436
36	7
160	415
152	44
36	7
163	679

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APPEAL from the Warren Circuit Court.

DOWNNEY, C. J.—Two errors are assigned in this case: 1. The overruling the demurrer to the complaint. 2. The refusal of the court to grant a new trial.

The action was brought by the appellees against the appellants. The material facts in the complaint are, that Caleb Rhodes, on the 6th day of August, 1860, conveyed to John R. Green and Henry Green, each, a certain tract or tracts of land in Illinois. In June, 1863, an action of ejectment was commenced against the Greens for the lands in Illinois. Caleb Rhodes had notice of this action, and assisted in the effort to defend it, but the effort was not successful. The lands were taken from the Greens. In October, 1864, the Greens each sued Caleb Rhodes, in the Warren Circuit Court, on the covenants in the deeds which he had made to them, and they afterward recovered judgments, had executions issued on them, and returns of no property found. In July, 1863, Caleb Rhodes conveyed certain real estate in Warren county to Joseph H. B. Rhodes, his son, and co-defendant. In July, August, November, and December, 1862, and in January, 1865, certain third persons conveyed other tracts of land to said Joseph H. B. Rhodes. In June, 1866, Joseph H. B. Rhodes and his wife conveyed said real estate to Clark B. Slade and Joseph Slade, who are defendants, and who paid the purchase-money, except four thousand dollars, and took their deeds. For the remaining four thousand dollars they executed their notes, secured by a mortgage on the land, to Sarah J., the wife of Joseph H. B. Rhodes.

It is alleged that the lands conveyed by such third persons were the property of Caleb Rhodes, and that it, as well as that which was conveyed by Caleb Rhodes himself to Joseph H. B. Rhodes, was conveyed to said Joseph H. B. to defraud the said plaintiffs, as his creditors, as aforesaid. Sarah J. died after the commencement of this action, and in an amended complaint it is alleged that her husband is her only heir. All the defendants, including Sarah J. Rhodes,

are charged with fraud, except that it is conceded that the Slades were guilty of no actual fraud; but as they had notice of the alleged fraud when they yet owed four thousand dollars of the purchase-money, it is claimed that the land is liable in their hands to that extent.

The demurrer to the complaint was for the reason that it did not state facts sufficient to constitute a cause of action.

Caleb and Joseph H. B. Rhodes answered in two paragraphs: 1. The general denial. 2. That in the year 1845 the mother of the defendant Joseph H. B. Rhodes placed in the hands of Caleb Rhodes money and property belonging to her in her own right, amounting to three thousand dollars, in trust for Joseph H. B. Rhodes, her son, which trust was evidenced by an instrument of writing executed at that time, but which has since been lost, to be held, kept, and controlled by said Caleb Rhodes, in trust for said Joseph, until he was twenty-one years of age; that Caleb kept said fund separate from his own, and with it purchased said lands for said Joseph, which he deeded to said Joseph in July, 1863, having had the deed made to himself therefor on account of the minority of said Joseph, and conveyed it to him, after he was twenty-one years of age, in fulfilment of said trust; that all the money paid therefor belonged to said Joseph in his own right; that the residue of the lands mentioned in the complaint were purchased by, and paid for by, said Joseph with his own funds; wherefore, etc.

Slades answered, admitting the allegations of the complaint and expressing a willingness to pay the money due from them as the court might direct.

There was a reply in denial of the second paragraph of the answer of the Rhodeses.

A jury tried the case, and found a verdict for the plaintiffs, on which, after overruling a motion for a new trial, the court rendered judgment.

The first question relates to the sufficiency of the complaint. Counsel for the appellants insist that if the plaintiffs have any remedy, it is by a proceeding supplemental to exe-

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cution, and not by an action like this. They regard the proceeding in this case as an attempt to subject the money due from the Slades to Sarah J. Rhodes, and to her husband since her decease, on the notes and mortgage, to the payment of the judgment of the plaintiffs. But we do not so consider it. We think it is a suit to set aside fraudulent conveyances of the land conveyed by Caleb Rhodes, and by others at his instance, to Joseph H. B. Rhodes, and by him to the Slades, and to subject the land to the payment of the judgments. It may be true—we think it is—that as the Messrs. Slade had no notice of any fraud when they took their deed and paid their first payment of the purchase-money, they may be protected as to the amount paid by them on the land. *Lewis v. Phillips*, 17 Ind. 108. But to entitle them to claim as innocent purchasers, they must not only have made the purchase and received the deed, but they must have paid the whole of the purchase-money. If a purchaser receive notice of an equity before he has received his deed, or paid the purchase-money, it is in time. *Dugan v. Vattier*, 3 Blackf. 245; *Parkinson v. Hanna*, 7 Blackf. 400. The court correctly overruled the demurrer.

The next question relates to the correctness of the court's ruling in refusing to grant a new trial. The first irregularity complained of relates to the admission in evidence, over the objection of the defendants, of the various items of documentary evidence in the case. The objections were general. No particular defect or unfitness is pointed out, and we see none. *Schenck v. Butsch*, 32 Ind. 338.

Objection was made to the fourth and seventh questions and answers thereto in the deposition of Clark P. Slade, and the objection was overruled. The fourth paragraph states where the deed to him and Joseph Slade was written, who had it written, and who were present when it was written and signed. In the seventh paragraph the witness states that in the fall of 1862 he conveyed an undivided interest in part of the land in question to Joseph H. B. Rhodes; that Caleb Rhodes paid him the money for it, but he did not

know whose money it was. The interest conveyed belonged to his wife. He did not make the bargain for the sale, but simply signed the deed and received the money.

We think it was competent, in the first place, for the plaintiffs to show who were concerned in having the deed made, though it may not have been important where it was written. The deed referred to in the answer to question seven was already in evidence; and it is referred to, we presume, for identification only. It was proper to allow the plaintiffs to show that Caleb Rhodes paid the money, though the witness did not know whose money it was.

After the defendants had closed their evidence, the court allowed the plaintiffs—though it was opposed by the defendants—to introduce and examine one Joseph Brown as a witness. The defendants objected, on the ground that this evidence was not rebutting, and had been given in chief. If there was any good reason for doing so, we think the court might allow a witness examined by the plaintiff to repeat, after the defendant's evidence was through, what he had previously sworn to. We ought to presume that there was some justifiable reason for so doing in this case, as the contrary is not shown.

Exception is taken to the refusal of the court to give instructions numbered three and five, asked by the defendants. Number three is as follows: "If the jury believe, from the evidence, that that portion of the land in controversy conveyed by Caleb Rhodes to Joseph H. B. Rhodes was, in the first instance, purchased with the funds the said Caleb Rhodes held in trust for said Joseph H. B. Rhodes, then their finding as to such lands should be for the defendants; and it would be unnecessary for them to inquire into any further facts pertaining to said lands, because they would, in no event, be liable for the debts of Caleb Rhodes."

This instruction was "refused, except as given in other instructions." In the first charge, after some general observations as to trusts and trust funds, the court said to the jury: "If, then, the jury believe, from the evidence, that

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the property deeded by Caleb Rhodes to Joseph H. B. Rhodes, described in the complaint, was purchased with money or funds which he, the said Caleb, held in trust for his said son, the same having been placed in the hands of the said Caleb by the mother of the said Joseph H. B. Rhodes, in trust for the said Joseph H. B. Rhodes, then said lands were the property of the said Joseph H. B. Rhodes, in his own right, and are not, nor are their proceeds, liable for the debts of Caleb Rhodes; for an estate purchased in the name of one, with money belonging to another, is subject to a resulting trust in favor of the party to whom the money belonged, if the conveyance was taken without the consent of the beneficiary, or if from infancy he was unable to consent."

When considered with reference to the case made by the pleadings and the evidence in the case, we cannot see any material difference between these two propositions. The case is put on the ground, both in the pleadings and the evidence, that these lands were paid for with money in the father's hands, which came from the mother, conveyed to the father and by him to the son, in fulfilment of the trust. The charge given is exactly applicable to that state of facts, and superceded the necessity of giving the second.

The fifth charge was as follows: "Before the plaintiffs can recover in this action, they must show to your satisfaction, by a clear preponderance of the evidence, that at the time of the conveyance by Caleb Rhodes to Joseph, his son, these plaintiffs had a valid subsisting claim or debt capable of being enforced by a recovery in a court of law of competent jurisdiction (either then or upon its maturity). They must also show, by a clear preponderance, that even if such a claim was existing, the said Caleb made the conveyance for the purpose and with the intention of defrauding his then existing creditors. Also, that by virtue of such conveyance these plaintiffs were, in fact, defrauded. If this conveyance was made in pursuance of a family settlement, and had been made by Caleb many years previous, and

made without any fraudulent or evil intent upon his part, and there was no existing debtor injured thereby (or liabilities incurred by him), and it was received by Joseph without fraudulent intent, the plaintiffs would not be entitled to recover."

The court modified this instruction by inserting the words in parenthesis, and the defendants excepted to such modifications.

The evidence shows that the lands in Illinois conveyed to the Greens by Caleb Rhodes were incumbered by judgment in the United States Circuit Court for the southern district of Illinois against former owners of said land, and that the land was sold on that judgment, and an action of ejectment was brought against the occupants of the land before July 8th, 1863, the date of the deed from Caleb Rhodes to Joseph H. B. Rhodes, though judgment in the ejectment suit was not rendered until in January, 1864. The evidence fully justifies the conclusion that Caleb Rhodes was anticipating trouble from the incumbrance on this Illinois land from a date much earlier than the date of this deed.

Under the circumstances, we think it quite clear that the Greens should be regarded as creditors of Caleb Rhodes from the date of his deed to them, which was August 6th, 1860. He then conveyed them incumbered real estate, and he could not, by fraudulently conveying away his property, prevent them from reaching it in the hands of those affected by the fraud. There is no reasonable objection to the charge, as modified and given.

The following instruction was given by the court, on its own motion, and there was an exception to it: "If the jury believe, from the evidence, that the plaintiffs recovered judgments against Caleb Rhodes in the Warren Circuit Court, and that those judgments were founded upon the covenants of deeds made by Caleb Rhodes to the plaintiffs, Caleb Rhodes could not make a voluntary conveyance of his property after the delivery of said deeds, nor could he convey to any person, except an innocent purchaser for value,

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so as to avoid any judgment which might be recovered on the covenants of said deeds."

Taken in connection with the evidence, which shows that Caleb Rhodes divested himself of all his property subject to execution, this charge is not erroneous. If it had appeared that he retained in his hands ample property to meet every claim which might be made against him on the covenants in the deeds, the instruction might not have been correct, for the mere fact that one is indebted does not prevent him from voluntarily conveying away a part of his property.

Again, the court instructed the jury as follows: "The principal question for you to determine in this case is, with whose means were the lands in controversy in this case purchased by Caleb and Joseph H. B. Rhodes? And the plaintiffs in this proceeding can only follow such, if any there be, of the lands in controversy which may have been purchased with the money of Caleb Rhodes."

It was asserted in the answer, and the evidence of the defendants was produced to show, that the money with which all the land in question was purchased was the money of Joseph H. B. Rhodes; hence the question, whose money paid for the land was the principal question. The other branch of the charge; that is, that the plaintiffs can only follow such of the lands, if any, as were purchased with the money of Caleb Rhodes, is in accordance with the law as given by the court in the first of the charges asked by the defendant, and, we think, is correct.

The last point made is, that the verdict is not sustained by sufficient evidence. This point is urged upon us quite strongly. It is insisted that it is not shown that there was any fraud on the part of Joseph H. B. Rhodes, or on the part of his deceased wife, under whom he claims the remaining four thousand dollars of the purchase-money from the Slades. But we think the circumstances attending these transactions, from the time of the execution of the first deed to Joseph H. B. Rhodes, in July, 1862, down to the making

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of the last deed to him in January, 1865, are quite unusual and suspicious, and needed explanation.

Since fraud is a question of fact, and not of law, it is the peculiar province of the jury to decide upon the facts, the credibility of the witnesses, and the weight and effect of the evidence. Fraud may be found from circumstances as well as from positive evidence. Juries do not generally incline too much against fraud; on the contrary, it is feared that it too frequently escapes detection, on account of the cunning and artifice of those who engage in it.

It seems hardly possible that Joseph H. B. Rhodes did not know the character of these various conveyances. Sarah J. Rhodes was his wife. The notes and mortgage were made payable to her without any apparent reason for it; for it is not shown that she paid anything for them. Upon the whole, we are of opinion that on the evidence we cannot reverse the judgment.

. The judgment is affirmed, with costs.

BUSKIRK, J., dissents, on the ground that the plaintiffs were not creditors of Caleb Rhodes when the deeds in question were made.

Monroe M. Milford, Marshall M. Milford, A. A. Rice, and J. Buchanan, for appellants.

J. H. Brown, B. F. Gregory, and J. Harper, for appellees.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD COMPANY v. BEATTY.

RAILWAY.—Fencing Road.—Liability.—A railroad company is not required by the statute to fence its road, where such fencing would result in cutting itself off from the use of its own land, or leased property, or buildings, or wood sheds, although the buildings or sheds may not be in present use; and if cattle are killed at such a point by the cars of the company, it is not liable, unless there is proof of negligence or want of care or skill on the part of the persons operating the train.

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APPEAL from Bartholomew Common Pleas.

BUSKIRK, J.—This was an action commenced by Beatty, the appellee, against the appellant, before a justice of the peace, under the statute, for the value of a cow killed by appellant's cars. The case was appealed to the Court of Common Pleas, where there was a jury trial and verdict for plaintiff below, for fifty dollars. A motion for a new trial, for the reason that the verdict was contrary to the evidence, was overruled, and the question for this court to determine is whether the evidence warranted the verdict. Appellant insists that the judgment ought to be reversed, for the reason that the evidence in the case, there being no conflict in the testimony, clearly failed to sustain the verdict.

It was admitted that plaintiff's cow was killed by defendant's cars, and that she was worth fifty dollars. Beatty, the plaintiff, testified as follows: The cow was killed in 1869; he found her lying just south of Walesboro, in Bartholomew county, on the east side of a switch, and south of platform, and north of cattle-guard, as shown by plat exhibited to witness. The cow was lying about thirty-five feet south of south end of platform; the indications on the track were that she was struck about thirty feet south of south end of the platform. On cross examination, plaintiff stated that as shown on said plat, there was a highway, marked on the plat "street," running nearly east and west, immediately south of Walesboro, extending up to it from the north, and that there is one residence on the west of the railroad, and south of the highway, as shown on said plat. There is a main track and switch of appellant's road, as shown on said plat, also a cattle-guard at the south end of the switch, as shown on this plat. The west side of the railroad is securely inclosed by fence and woodshed, as shown by plat, from said highway south to said cattle-guard. On the east side, from the east end of said cattle-guard, there is a secure fence, as shown by said plat, north, thence east, and thence north to said highway. The distance from said point where said last named fence intersects the highway, west, along the highway

to the railroad track, is about eighty or ninety feet. It is about twenty-five or thirty feet from track of railroad to this fence at the south. There is no fence along said highway between said two points. The space east of the main track and switch is securely fenced, except along said highway. Said space east of said track is, and has been for several years, used by the railroad company as a shipping yard, where cars are loaded and unloaded with lumber upon and from cars on the switch. There is another platform north of said highway, not shown in the plat, in the town of Walesboro, which is mostly used by the company, but the platform as shown on the plat south of the highway is used occasionally by passengers getting off of long trains going north, from rear cars, and for express matter from forward car of long trains going south; but this is not very often; it is only occasionally. The said space and track could be securely fenced by running a fence from the east side of said switch, along said highway east of said fence, intersecting the highway as aforesaid, and by constructing cattle-guards across said switch and main track and the space between them, but such cattle-guards would obstruct the passage of persons to and from said platform south of the highway. The railroad company could erect a gate in said fence for ingress and egress of shippers of lumber. The woodshed has not been used for many years. The road could be securely fenced by running a fence from the cattle-guard north to the south end of the platform, and then a cattle-guard across the track; the lumber could be loaded at the platform, and passengers and freight at the platform would not be interrupted. This fence would prevent loading lumber south of the platform, or it could be fenced along the highway to the track, thence south along the track to the south end of the platform, and then a cattle-guard across the track.

James Stader testified that the cow was struck thirty feet south of the platform; the railroad company leased said yard from witness for shipping purposes several years since, and it has been so used continuously since. The lumber is

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loaded on the cars on said switch, and piled and stacked in said yard for shipment. The most of the loading and unloading is done along said switch, from the highway to the south end of the platform, and the yard to that extent is mostly used, but the whole length of the switch from the highway to the cattle-guard, as well as the yard, are occasionally used for shipping purposes as aforesaid. Most of the freight is put on cars north of the highway in Walesboro. He testified the same as plaintiff as to fencing.

Dr. Clark testified substantially the same as the preceding witnesses, as to description of premises, the use of platform, switch, and shipping yard. He further testified, that a fence could be built from said point in said "street" where said west fence intersects it from the south, south-west to a point on said switch at or near the south end of said platform, and from thence cattle-guards across switch, space between, and main track, and thus inclose all of said yard and switch and track south of the fence, and cattle-guards; and access could be had to said yard south of said fence by means of a gate through the fence; or fence along the highway to the railroad track, thence south along the track to the south end of platform, then a cattle-guard across the track; or a fence from the cattle-guard north to south end of platform, then cattle-guard across track; this would interrupt loading lumber south of platform, but it could be done at or near the platform. It is eighty feet from the track to fence along the highway east to the fence, twenty-five or thirty feet at the south end from track to fence, and four hundred feet from highway to cattle-guards; there is no fence along the highway.

In behalf of the defendant, Phil. M. Dailey testified that the plat from which witnesses testified is correct; that the same was made by him upon actual view of the premises, and measurements of distances, and the plat was given to the jury in evidence.

From the foregoing evidence, and the diagram which is in

the record, it appears that the situation of the locality where the cow was killed is as follows: The railroad runs north and south through the town of Walesboro, and across, at nearly right angles, a highway or "street" at the southern limits of the town. A switch east of the main track runs through the town across the highway south to a cattle-guard, four hundred feet south of the highway. On the west, the railroad is securely inclosed by fence and woodshed from the highway to the cattle-guard; from the east end of the cattle-guard, which is twenty-five or thirty feet wide, there is a secure fence, north, north-east and north to the highway, at a point eighty feet east of the railroad. It will be seen from the evidence that the east line of the company's right of way is about equidistant between the switch and the north end of the last described fence. There is a platform north of the highway not seen on the plat, in the town of Walesboro, mostly used by the company. South of the highway, and adjoining it, there is another platform between the main track and switch, which is occasionally used by passengers getting off of rear cars of trains going north, and for receiving and delivering express matter from express cars going south. The space east of the side track not owned by the company, was leased several years ago by the company, and has been continuously since, with the ground owned or claimed by the company, used as a shipping yard for lumber, the lumber being loaded and unloaded on and from cars on the switch, and the lumber piled and stacked in the yard. The switch and yard are principally used only as far south as the south end of the platform, but occasionally the switch and yard are used as aforesaid, all the way to the cattle-guard.

The space embracing the yard, main track, and side track, from the highway south to the cattle-guard is securely inclosed except from the highway; within this space, about thirty feet south of the platform, the cow was struck by appellant's cars.

It is earnestly insisted by the appellant, that the locality described could not properly have been more securely fenced

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than it was ; that to require other and further fencing, would be to require the company to incommode the public, and deprive herself of her proper and legitimate use of her own property and corporate rights. " Railway companies are not responsible for damages accruing to domestic animals from want of fences at points which do not properly admit of being fenced, as in the immediate vicinity of engine houses, machine shops, car houses, and wood yards." 1 Redf. on Railways, 469. It will be seen that in the cases put, it would affect directly the rights of the railroad companies only, to require them to fence, whilst in this case the rights of the public would be injuriously affected as well as the company. In this court the same doctrine is established by a uniform current of decisions, commencing with the *Lafayette & Indianapolis R. R. Co. v. Shriner*, 6 Ind. 141.

The law, as stated by Redfield, in his valuable work on Railways, is fully sustained by this court in the cases of the *The Indianapolis, etc., R. R. Co. v. Kinney*, 8 Ind. 402, and *The Indianapolis, etc., R. R. Co. v. Oestel*, 20 Ind. 231.

The plaintiff below in his evidence says, what is perfectly apparent, that said space and track could be securely inclosed by running a fence along the highway from the switch east to the fence, intersecting the highway, and by constructing cattle-guards across the main track, switch, and space between, but the cattle-guards would obstruct the passage of persons across the highway to and from the platform south of the highway. And he says a gate could be erected in the fence for ingress and egress to and from the yard. The fence along the highway would answer no practical purpose without the cattle-guards, for without them cattle could enter from the highway on either track or the space between them. The platform south of the highway was put there by the company for a legitimate and proper purpose. The evidence shows what that purpose was, and although not constantly used, yet whenever its use is required, whenever it will subserve the convenience of the company or the public, they have the right to a free and unobstructed way to and

from the platform. Before the company can be required to cut herself and the public off from the platform, its abandonment must be shown; until then the right to its free use continues.

If the company in this case is required to erect and maintain a gate, much more ought she be required so to do in localities in the immediate vicinity of her machine shops, car houses, and wood sheds; for in the latter cases the company only would be directly affected and inconvenienced, whilst in the former both the company and the public would be inconvenienced. This is a question of law, based upon the conceded patent fact that it can be done, whether the company is bound to erect and maintain the fence and gate. The company leased the yard for her own convenience and the use of the public, and we think that she and the public have the right to the free and unobstructed use of it.

The same witness says: "The road could be securely fenced by running a fence from the cattle-guard to the south end of the platform, and then a cattle-guard across the track; the lumber could be loaded at the platform, and passengers and freight at the platform would not be interrupted. This fence would prevent loading lumber south of the platform; or it could be fenced along the highway to the track, thence to the south end of the platform, and then a cattle-guard across the track."

The first fence and cattle-guard leave the track open from the highway to the south end of the cattle-guard, and cattle would be free to enter upon the track from the highway; and because the cow happened to be struck a short distance south of the south end of the platform, and the road was not inclosed from the south to the south end of the platform, it is contended that the company is liable. This fence and cattle-guard would simply make the trap smaller than it now is, and besides, it would deprive the company and the public of the use of all the switch and yard south of the south end of the platform. No abandonment is shown, and no good reason can, we apprehend, be given why the com-

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pany should be compelled to abandon this part of her switch and yard. The last fence cuts off, entirely, teams from the yard and leaves the same trap.

Another witness says a fence could be run from a point on the highway where the west north-and-south fence intersects it, diagonally across the yard to the south end of the platform, and there cattle-guards, and that a gate could be made through the fence.

From the evidence, about the correctness of which there is no controversy, the company owns about half of the space between the fence and the switch, and to require her to fence along the west side of the switch, would be to require her to cut herself off from her own ground, and to require her to fence on her line would cut off nearly half of the yard, and all leased from Stader.

And again, the company ought not to be required to fence on account of the wood shed, for although not now used, it stands there the property of the company, and it ought not to be required of her to deprive herself of the use of it whenever it may be needed or required by the company. The company has just as much right to this property and its use as any other owner of other property has to it and its intended use; and because the citizen may have ceased for "many years" to use his property, his mill, storehouse, or factory, it will not do to say that he is thereby deprived from resuming its use.

We hold that the appellant was not bound to fence her road at the point where the cow of the appellee was killed. The action was based upon the statute. There was no allegation or proof of negligence. The plaintiff cannot recover under the statute, because it does not apply where the road cannot be fenced; nor can he recover at common law, because there was no proof of negligence or want of care and skill on the part of the persons operating the train.

It is well settled that when stock at large is killed by a railroad engine, at a point on the road not required to be fenced, the rights and liabilities of the parties must be de-

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terminated by common law principles. See *The Indianapolis, etc., R. R. Co. v. Caldwell*, 9 Ind. 397; *The Lafayette, etc., R. R. Co. v. Shriner*, 6 Ind. 141; *Williams v. The New Albany, etc., R. R. Co.*, 5 Ind. 111; *The Indiana Central Railway Co. v. Gapen*, 10 Ind. 292; *The Madison, etc., R. R. Co. v. Kane*, 11 Ind. 375; *The Indianapolis, etc., R. R. Co. v. Kinney*, 8 Ind. 402.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

S. Stansifer, for appellant.

F. T. Hord, for appellee.

FORDICE and Another v. HARDESTY and Another.

36	23
162	537
3:	23
1171	244

VENDOR'S LIEN.—*Purchase-Money.*—*Subrogation.*—*Defeasance.*—A. and B. were the owners, as tenants in common, of real estate, for which B. had paid all the purchase-money; A. and B. united in a conveyance of said real estate by warranty deed, to a purchaser, C., who executed to each owner notes for one-half the price; B., at the time of the execution of said deed to C., notified C. that he had paid all the purchase-money for said real estate, and held a lien for the payment of one-half thereof on the half conveyed by said deed by A. to C., and would hold C. liable therefor; C., on the same day the deed and notes were executed, assigned the notes to D., and on the following day B. commenced suit against A. and C. and afterwards obtained judgment against A. for one-half the price of the land, and a decree as to A. and C., enforcing the lien of B. on the land; C. afterwards paid the judgment.

Held, that said facts were not sufficient to bar an action by D. against C. on the notes made by him to A. and assigned to D.

Held, also, that though B. might be subrogated to the rights of the vendor of himself and A. as to the undivided half held by A., yet, as against his unconditional deed, in fee simple, of warranty, he could not reserve such lien.

Held, also, that though B. and A. were also partners, and the real estate was owned by them as such, and B. would hold a lien thereon (as against A.) for the ultimate balance due him on a settlement of the partnership accounts, yet he could not set up such lien in opposition to said deed.

COMMENCEMENT OF ACTION.—*Summons.*—*Sheriff.*—The issuing of summons

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is the commencement of an action, and a summons is not issued until it comes to the hands of the sheriff.

PROMISSORY NOTE.—*Assignee.*—*Judgment.*—*Parties.*—*Notice.*—In an action by the assignee of notes given for purchase-money of real estate, against the maker, there cannot be given in evidence a judgment enforcing the lien of a former vendor, in a suit, commenced after the assignment of the notes, against the maker and his immediate vendor, to which the assignee was not a party.

APPEAL from the Parke Circuit Court.

DOWNEY, C. J.—On the 20th of July, 1868, the appellants commenced a suit against the appellees, on a promissory note dated August 15th, 1867, executed by Hardesty, with his co-defendant, Hendrix, as his security, to one Hamilton, and by him indorsed to the plaintiffs on the day of its date. And on the 24th day of June, 1869, they commenced another action against the appellees, on another note of the same date, executed to Hamilton, and indorsed on the same day.

These actions were, by agreement of the parties, and the order of the court, consolidated, and together constituted the case which is now to be considered.

Hamilton and one Toney had purchased certain real estate, which was conveyed to them as tenants in common, but for which Toney alleged that he had paid the whole price, and claiming that he and Hamilton had been partners in the purchase of the lands, and also that he had been, or should be subrogated to the rights of the vendor, he claimed to have a lien on Hamilton's half of the land for his half of the purchase-money. While the affair was in this position, on the 15th day of August, 1867, each sold his undivided half of the land to Hardesty, and united in conveying the said land to him by a general warranty deed, Hardesty, with Hendrix as his security, executing to each of them notes for his share of the purchase-money; and among those executed to Hamilton are the notes mentioned in the complaint in this case. It is alleged by Toney, that at the time of the execution of the deed from him and Hamilton to Hardesty, he gave notice to Hardesty that he had paid all the purchase-money for the land; that he held a lien on the

half thereof conveyed by Hamilton for the amount due him, and would hold Hardesty liable for it.

On the 15th day of August, 1867, Toney filed a complaint in the Parke Circuit Court against Hamilton and Hardesty, alleging his claim to a lien on the land, and seeking to have the same declared and enforced, on which process was issued, and was served on the 16th of the same month, the same day on which it came to the hands of the sheriff. The appellants were made parties to this suit during its progress, but after the filing of their answer, the suit as to them was dismissed. Hardesty made default.

There was final judgment in this case against Hamilton for the one-half of the price of the land, and the lien of Toney therefor was declared against the land, and its sale ordered. Hardesty paid off this judgment by giving to Toney his own notes for the amount, payable in a bank, and therefore governed by the law merchant; and he now alleges that the foregoing facts constituted a valid lien and incumbrance on the land at the time he purchased the same; that such lien was a breach of the covenants in the deed; and that his payment of the amount found to be due by the judgment in favor of Toney furnishes him a good defense against this action.

The circuit court sustained this view of the case, both in its rulings on the pleadings, and in its charges to the jury; sustained the finding of the jury for the defendants against a motion for a new trial, and rendered final judgment for the defendants.

We think the views of the court with reference to the questions arising in the case cannot be sustained.

Conceding that Toney and Hamilton were partners, and that they owned the land as such, in which case Toney would have a lien on the land for the ultimate balance due him on a settlement of the partnership accounts; or conceding that by subrogation to the rights of the vendor, he had a vendor's lien; yet neither of these rights could be set up in opposition to the general warranty deed executed

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by him and Hamilton to Hardesty for the land. That deed not only professed to, but did actually convey all the interest, both legal and equitable, of Toney, as well as of Hamilton, in the land. The fact, which is alleged, that Toney, at the time of executing the deed, gave notice to Hardesty that he would hold a lien on the land, and a claim against him for one-half of the price of the land, amounted to nothing. A party cannot thus reserve an interest in or claim to land in opposition to, and in contradiction of, an unconditional deed in fee simple. *Turner v. Cool*, 23 Ind. 56; *Chapman v. Long*, 10 Ind. 465.

If it be claimed that Toney's claim is saved by his having commenced a suit against Hamilton and Hardesty, on the day the deed was executed and the notes given and indorsed, it is a sufficient answer to that position to say that the suit was not commenced until the next day, the 16th of August, on which day the summons came to the hands of the sheriff. The issuing of the summons was the commencement of the action, and the summons is issued, not when it is filled up and signed by the clerk, but when it is delivered to the sheriff. 2 G. & H. 59, sec 34; *Hancock v. Ritchie*, 11 Ind. 48; *Evans v. Galloway*, 20 Ind. 479.

The court permitted the judgment in the case of Toney against Hamilton and Hardesty to be given in evidence in this case, over the objection of the plaintiffs, and instructed the jury that it was as conclusive against the plaintiffs as against Hamilton. This was erroneous. Hamilton had indorsed away to the plaintiffs the note sued upon, before the suit of Toney was commenced, as we have seen. The plaintiffs were not parties to that suit, and to make the judgment in that case evidence, and conclusive evidence against the plaintiffs, is to violate one of the fundamental rules of the law of evidence. 1 Greenleaf's Ev., sec. 522.

We do not deem it necessary to examine the other errors alleged in the case.

The judgment is reversed, and the proceedings, back to and including the answer, are set aside, with leave to the

parties to replead, if they desire to do so. Costs to the appellants.

Allan & Mack, D. H. Maxwell, S. F. Maxwell, and Porter, Harrison & Fishback, for appellants.

D. E. Williamson and A. Daggy, for appellees.

PEARSON and Others v. EAST.

36	28
126	284

VENDOR AND PURCHASER.—*Sheriff's Sale.—Trust.—Specific Performance.*—

A complaint to compel a conveyance of real estate based the right of the plaintiff to such relief upon two grounds: first, that A., whose executors, widow, and heirs were the defendants, having purchased said real estate at sheriff's sale upon executions against the plaintiff, agreed with the plaintiff at the time of the sale to hold the land in trust for the plaintiff; second, that the plaintiff had re-purchased the land in dispute from A., and had been put in possession of the same with an agreement that he should make improvements, and pay taxes, and repay purchase-money, and he had done such acts in part performance of the contract as entitled him to a decree for specific performance of the contract.

Held, that there was no sufficient allegation of a trust.

Held, also, that as a case for the specific performance of a contract for the sale and purchase of real estate, it was a good cause of action.

STATUTE OF FRAUDS.—*Continued Possession of Real Estate.*—Upon the question, whether the continued possession of the property, the plaintiff having been in possession as owner up to the date of the contract for the re-purchase, was sufficient—together with valuable improvements made by him upon the land after such contract; making clearings and fencing ground, worth two hundred dollars; building a barn, in value five hundred dollars; setting out fruit trees to the value of seventy-five dollars—to entitle him to a specific performance of the contract, the judges, remaining equally divided since the last term, certified a division of opinion.

APPEAL from Lawrence Circuit Court.

DOWNY, C. J.—The complaint in this case is against the executors of the will of George A. Thornton, deceased, his widow and heirs at law, the appellants, to compel them to convey to the appellee certain real estate described in the complaint.

It alleges the recovery of certain judgments against the

appellee and others, part of which were in favor of the deceased, and part of them in favor of others, the issuing of executions thereon, the sale of the real estate in question, the purchase thereof by the deceased, and the execution of a conveyance thereof to him by the sheriff.

It then alleges, that when the deceased purchased said real estate, there was an understanding and agreement between him and the appellee that the deceased was to hold in trust for the appellee. That after the sale of said land the deceased agreed with East that if the amount due on the executions should be paid to him, he having got control of them all, he would convey the land back to East; that the deceased put East into possession of the land under this contract, with the agreement that he should make improvements and pay the taxes on the land, and that he has continued in possession ever since, and that he has made improvements, with the knowledge of the deceased, and paid the taxes; that East has fully paid off the amount of the executions, and has demanded a deed of the executors, who have power by the will to convey, but that they have refused to make a deed.

Demurrers were filed by all the defendants to the complaint, which were overruled, and this is the first alleged error.

So far as the complaint attempts to set up a trust, it seems to us that it is defective. It will be seen that it does not aver any consideration for the agreement. It is *nudum pactum*. It does not set forth any facts from which the court could determine the nature of the trust, if there was a consideration alleged. It is not shown to be a case justifying the application of the rule of law laid down in the case of *Arnold v. Cord*, 16 Ind. 177.

It is decided by this court that "a person cannot be treated as a trustee who, without fraud, purchases real estate at a sheriff's sale with his own money, and takes the title in his own name upon a verbal agreement to hold it for the benefit of the execution debtor. *Minot v. Mitchell*, 30 Ind. 228.

This was a much stronger case than the one at bar, so far as this feature of it is concerned.

But looking at the case as one based on a claim for the specific performance of a contract for the purchase of real estate, we think it contains a valid cause of action. It alleges the contract for the sale of the real estate, in consideration of the payment of the amount due on the executions, the putting of the vendee in possession under the contract, the making of valuable and lasting improvements, and the payment of the purchase-money. For this reason the demurrers were correctly overruled.

The defendants answered by general denial, and, in addition to this, all of them, except the executors, filed a second paragraph as a cross complaint, in which they allege that they are the owners of the real estate and entitled to the possession thereof; that the appellee had possession, and for six years had kept them out of possession, to their damage, etc.

Demurrer to the cross complaint overruled; reply filed; trial by the court, and finding and judgment for the appellee. Motion for a new trial overruled, and exception, putting the evidence in the record.

A question was raised and reserved by exception, during the progress of the trial, as to the propriety of the ruling of the court in allowing parol evidence of the trust attempted to be set up in the complaint. Having held that there was no sufficient allegation of a trust, we must hold that this evidence was improperly admitted. Viewing the complaint as one for specific performance, we are of the opinion that the evidence was not sufficient to justify the finding of the court.

The complaint alleges that the appellee was put into possession under the contract of purchase, but the evidence of the appellee himself shows that he was in possession before and at the time when he alleges the contract to have been made. While it is well settled that the taking of possession under a contract of purchase of real estate is sufficient to

Pearson and Others v. East.

take the case out of the operation of the statute of frauds, it is equally well settled that simply to remain in possession is not sufficient, even though the purchase-money may have been paid and improvements made. *Adams Eq. 86, et seq.; Moreland v. Lemasters, 4 Blackf. 383; Johnston v. Glancy, 4 Blackf. 94.*

If the purchaser has made improvements for which he has a valid claim, he can be compensated therefor in damages. *Anthony v. Leftwich, 3 Rand. 238.* And if he has paid purchase-money, he may recover it in an action for money had and received.

I think the judgment ought to be reversed.

WORDEN, J.—I concur in the above opinion.

BUSKIRK, J.—The appellee based his right to relief upon two grounds: first, that Thornton held the land in dispute in trust for him; second, that he had re-purchased the land from Thornton, and had done such acts in part performance as entitled him to a decree for specific performance of the contract of purchase. I agree with my brother judges DOWNEY and WORDEN, that a trust could not be created and proved by parol in a case like this; but I am constrained to differ with them upon their view in reference to the right of the appellee to a specific performance of the contract.

Thornton obtained a judgment against James L. East, who was the son of the appellee. Several other persons had judgments against him, and Thornton became the owner of all of them. The appellee was the security of the said James L. East upon such judgment. The lands and personal property of James L. East, and the land of the appellee, were levied upon by executions issued on said judgments, and were sold and purchased by Thornton. The appellee was in the possession of the land in dispute, at the time it was purchased by the decedent. Thornton, on the day he purchased the land, made and entered into an agreement with the appellee, by which it was agreed and understood

that he would reconvey the land to the appellee whenever he was paid the amount of the principal and interest due upon his said judgments. Under and by virtue of this agreement, the appellee retained the possession of his farm, and in pursuance of said agreement paid to the decedent the entire amount coming to him, paid the taxes on the land, made lasting and valuable improvements thereon, with the knowledge and consent of the decedent. It appears from the evidence that the appellee built a barn worth five hundred dollars; cleared and fenced ground worth two hundred dollars; set out fruit trees worth seventy-five dollars, and built a house worth three hundred dollars, making in the aggregate one thousand and seventy-five dollars.

It is conceded that the appellee paid the purchase-money and made lasting and valuable improvements, with the knowledge and consent of the decedent, but it is maintained that the case is not taken out of the operation of the statute of frauds, because the appellee was in possession at the time of the re-purchase, and retained the possession under the said contract. In other words, that the appellee did not take possession under the contract, but continued in possession under such contract. The case of *Johnston v. Glancy*, 4 Blackf. 94, is referred to as an authority in support of the position assumed. I do not think that case sustains the position taken by my brethren. That was an action to obtain a specific performance of a parol contract for the purchase of real estate.

This court say: "The ground upon which relief is granted in these cases is fraud; and the great leading principle by which courts are governed is, that there must be some act of performance done that is palpable and evident to the senses of all, an act that can be relied on as certain, about which there can be no misunderstanding, and which does not rest solely in the recollection, understanding, or belief of witnesses, such as absolute and visible possession of the premises, the actual building of houses, or the making of other lasting improvements. But even these acts of

part performance must be done with a direct view of the agreement being performed, and be such acts as could be done with no other view, or the agreement will not be taken out of the statute."

I fully indorse the above doctrine. It is not made to depend upon whether the party took possession or remained in the possession of the premises; but it is based upon the broad ground that the party was in the absolute and visible possession, and made lasting and permanent improvements, that were open and visible to the senses, such as building houses or barns, or clearing and fencing land.

But it is said in the same opinion: "But possession by a tenant, who was in possession of the premises as a tenant at the time of the purchase, and who remains in possession, is not considered a part performance; for a tenant, of course, may continue in possession until he has notice to quit, and therefore the mere act of his continuing in possession amounts to nothing, and will not take the case out of the statute. *Wills v. Stradling*, 3 Ves. 378; *Savage v. Carroll*, 1 Ball. & Beat. 265; *Anthony v. Leftwich*, 3 Rand. 238; 2 Hovend. Fr. 3; Sugd. Vend. 80."

The same doctrine is laid down by Mr. Fry, in his work on Specific Performance, on pages 253 and 254, as applicable to tenants. I have examined a large number of the cases referred to on this point, and I find that the most of them were made to turn upon the fact that the relation of landlord and tenant existed at the time of the purchase. In the case under consideration, that relation never existed between the appellee and the decedent. There was no renting, no agreement to pay rent, and no rent was ever paid.

Mr. Fry states the rule thus: "The principle upon which courts of equity exercise their jurisdiction in decreeing specific performance of parol agreements, accompanied by part performance, is the fraud and injustice which would result from allowing one party to refuse to perform his part, after performance by the other upon the faith of the contract."

The object of the statute of frauds was to prevent frauds

and perjuries. Where there is nothing more than a mere contract of purchase, there can be no specific performance, because the question of whether there was a contract depends solely upon the testimony of witnesses, and there is a strong temptation to commit perjury and thereby perpetrate a fraud; but where there has been open and visible possession for a number of years, the making of permanent and valuable improvements, the payment of the purchase-money and taxes, open and undisputed acts of ownership, and the repeated promise of the vendor to execute a deed, as in the case under consideration, the party is entitled to a specific performance, because in such a case there is no danger of perjury, and to adopt a different rule would be to encourage fraud, and not to prevent it.

But it is claimed that no wrong would be done to the appellee, because he can be compensated in money. I admit that he could in part, but not in full. The measure of damages would be the purchase-money and the value of the improvements made. The evidence shows that the land sold for much less than its value. The appellee would lose the difference between the real value of the land and the price at which it was purchased at the sheriff's sale, and, besides, he would lose any increased value of the lands by reason of his improvements and the general improvements of the country.

In the case of *Montacute v. Maxwell*, 1 P. Wms. 618, the Lord Chancellor said: "In cases of fraud, equity should relieve, even against the words of the statute." So I think in this case. The decedent never was, in justice and equity, the owner of the land in dispute. By his agreement he prevented the appellee from redeeming his lands; and now to permit him to take advantage of his own wrong would be a gross fraud, and especially so when full compensation could not be made under the hard rule of the common law.

I am in favor of affirming the judgment of the lower court.

Church v. Cole.

PETTIT, J.—After fully considering the opinion of my brothers DOWNEY and WORDEN, and the opinion of my brother BUSKIRK, I am constrained to give my full consent and approval to the opinion of the latter. And I add, that instead of preventing frauds, a reverse ruling would conduce to the perpetration of the grossest frauds.

The judgment is affirmed, with costs.

E. D. Pearson. A. C. Voris, and F. Wilson, for appellants.
A. B. Carlton, for appellee.

CHURCH v. COLE.

REAL ESTATE, RECOVERY OF.—*Contract of Purchase.*—In an action for the possession of real estate, the defendant answered, that on the 15th day of March, 1863, he purchased the land in controversy from A., who resided, as did also the defendant, in the State of New York; that the conditions of the purchase were, that the defendant was to go to Indiana and examine the land, and if he was pleased with it, he was to take it at two thousand dollars, having sufficient time to make the money from the land, paying in the interval interest annually at the rate of seven per cent.; that after a sufficient amount was paid to secure A., defendant was to receive a conveyance and execute a mortgage for the balance of the purchase-money; that defendant entered into possession of the land under said contract, and has ever since remained and still continues in peaceable possession of the same, and has made lasting and valuable improvements on the same; that afterwards, about July, 1865, A. conveyed the land to B., who had full knowledge of defendant's purchase and possession and took said deed only to aid defendant to carry out his contract, and with the agreement that he, said B., would pay the money to said A. for defendant and hold the land on the same conditions that it had been held by A. under his contract with the defendant, receiving one hundred and twenty dollars for his trouble and interest on the entire sum advanced by him, until repaid by defendant; that B. did so advance the money due A., being twenty-two hundred and eighty dollars, and on the 6th day of November, 1866, received under said agreement and as interest, one hundred dollars, and on the 26th day of November, 1867, two hundred dollars as such interest, and on the 30th day of March, 1868, seventy-eight dollars and eighty-five cents as

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further interest; and said B. has never demanded the payment of the principal, but on the 25th day of June, 1868, the defendant tendered to B. five hundred dollars as payment on the principal, which B. refused; that defendant has been ever since and now is ready to comply with his contract; that at the time of the conveyance to B. the land was worth four thousand dollars; that on the 8th day of May, 1868, B. conveyed the land to C., the plaintiff, who had full knowledge of all the facts, and who executed a mortgage to B. for two thousand two hundred and seven dollars and fifty cents; that said land is worth six thousand five hundred dollars; and defendant asked that B. should be made a party, and on payment of the sum due him according to the contract, should convey the land to the defendant, and that the deed to C. and mortgage to C. be declared void.

Held, that the paragraph was sufficient.

SAME.—Mortgage in Equity.—The defendant filed a second paragraph of answer, alleging that in July, 1865, he was indebted to A. in the sum of two thousand two hundred and eighty dollars, as purchase-money for the said land, for which he had received no deed; that B. agreed to, and did advance by way of loan to the defendant said sum, and defendant paid the same to A. who thereupon executed a deed of conveyance to B., who agreed to hold said title as a mortgage to secure his loan to the defendant, and agreed to receive interest upon said sum and one hundred and twenty dollars for his trouble and to give reasonable time to defendant to pay said sum so advanced, or to sell said land to raise the money to repay said loan; that he subsequently received said payment for his trouble and various sums as interest; and defendant, on the 25th day of June, 1868, tendered to B. five hundred dollars, as a payment, which he refused to receive, and executed a deed to C., who had full knowledge of all the facts; and defendant prayed that the deed might be declared void, and a conveyance by B. to the defendant ordered on payment of amount due from defendant.

Held, on demurrer, that this paragraph was good.

SAME.—Trust.—A third paragraph alleged the contract of purchase from A.; that B. took the title as a trustee for the defendant, and received payment for his trouble and interest on the money advanced; and that he conveyed to C., who had full knowledge of the trust.

Held, that this paragraph was good on demurrer.

APPEAL from Elkhart Circuit Court.

PETTIT J.—This was a suit for the possession of real estate and damages for its detention. The complaint was in the usual and proper form. The defendant answered in three paragraphs, as follows:

“Comes now the defendant, and for answer to plaintiff’s complaint, says that on the 15th day of March, 1863, the defendant, at Monroe county, State of New York, purchased

the land mentioned in plaintiff's complaint, of Alvah Benedict, who heretofore was the owner of the same, said Benedict and defendant being then both residents of said State of New York, said purchase being upon the conditions following, to wit: that defendant was to come to Indiana and look at said land, and if he liked it, was to take possession thereof as his own, and was to pay said Benedict therefor two thousand dollars, for the payment of which said Benedict was to give the defendant sufficient time to make the amount due from the farm, and defendant was to make payment at such times and in such amounts as he could from the proceeds of such land; and until the purchase-money should be paid, defendant was to pay said Benedict interest on the amount due, at the rate of seven per cent. per annum, payable annually; and upon payment of a sufficient amount of the purchase-money, so that Benedict would be secure, he (Benedict) was to convey the said land by deed to defendant, taking a mortgage back on the same from defendant, to secure the payment of the balance due; that under, and in pursuance of said purchase, the defendant took possession of said land as his own, and was put into such possession thereof by said Benedict, and has ever since had, and now has, exclusive and uninterrupted possession thereof, and has all of said time lived thereon with his family, and farmed and used the same as his own, and has made lasting and valuable improvements on the same; that afterward, to wit, about the 1st day of July, 1865, and while defendant had possession of said land as aforesaid, the said Benedict conveyed by deed said land to Alfred Wright, who had at that time full knowledge of said possession and purchase of this defendant, and took and received said deed for the purpose only of aiding the defendant in carrying out his said contract of purchase with said Benedict, and upon these conditions, that he (Wright) should take the legal title of said land from said Benedict, upon the same terms, and stand toward defendant in the same relation that Benedict had heretofore occupied; and in furtherance of said

contract of purchase, between said defendant and said Benedict, and for no other purpose, said Wright advanced for defendant the amount then due from defendant to Benedict, to-wit, the sum of twenty-two hundred and eighty dollars, said Benedict then waiving all objection to the non-payment of interest to him by defendant as it had theretofore become due, which amount of twenty-two hundred and eighty dollars defendant was to thereafter pay to said Wright instead of to said Benedict, together with the further sum of one hundred and twenty dollars for said Wright's expenses and trouble in obtaining said conveyance to himself, and the interest on the whole sum; and in compliance with said contract of purchase, defendant did on the 6th day of November, 1866, pay to said Wright, one hundred dollars as interest on said purchase-money, and also on the 26th day of November, 1867, did pay the further sum of two hundred dollars as such interest, and on the 30th day of March, 1868, the further sum of seventy-eight dollars and eighty-five cents, as such interest, all of which was taken and received by said Wright as such interest; that said Wright has never demanded the payment of the principal so due him, but that on the 25th day of June, 1868, the defendant tendered and offered to pay said Wright the further sum of five hundred dollars on the principal of said purchase-money, which said Wright then and there refused to take and receive; that defendant is yet, and ever has been, ready and willing to comply with and fulfil the terms of said contract of purchase. That said land at the time of conveyance thereof to Wright, as aforesaid, was of the value of four thousand dollars; that afterward, to wit, on or about the 8th day of May, 1868, said Wright, in violation of said contract of purchase, and while the defendant was in possession as aforesaid, executed a deed of said land to the plaintiff, which is the pretended title by which he claims to recover the same in this suit; that the plaintiff, at the time he took said deed, gave back and executed to said Wright a mortgage on said lands for the sum of twenty-two hundred and seven dollars and fifty cents,

and at said time had full knowledge of the possession and purchase thereof as aforesaid, by the defendant; that at the time said last mentioned deed was executed, and now, said land was and is worth six thousand five hundred dollars. Wherefore the defendant prays the court that said Alfred Wright may be made a party hereto, and be decreed to receive payment of said purchase-money, according to the terms of said contract, and upon payment, to convey said land to the defendant; and that said mortgage and deed to the plaintiff be decreed to be void, and be cancelled and annulled.

"Second. And for second and further answer to plaintiff's complaint, defendant says that on or about the 1st day of July, 1865, the defendant was indebted to Alvah Benedict in the sum of twenty-two hundred and eighty dollars, it being the purchase-money for the real estate mentioned in plaintiff's complaint, which the defendant had theretofore purchased from said Benedict, but for which a deed had not yet been executed by him to the defendant; that on said day it was agreed by and between said Alfred Wright and the defendant, that said Wright should advance for and loan to the defendant, said sum of twenty-two hundred and eighty dollars upon the following terms: that said sum of twenty-two hundred and eighty dollars should be paid to said Benedict in extinguishment of the said debt of defendant to him, and that Wright should receive and take a deed of the said lands in his own name from said Benedict, to be held as a mortgage to secure the repayment of said sum of twenty-two hundred and eighty dollars to him, said Wright; that defendant should have time, until he was able to make such repayment off of the proceeds of said lands, and in the meantime to pay said Wright interest on said sum so loaned to defendant by said Wright, and if defendant could not repay said sum of money so loaned to him by said Wright, in a reasonable time, the defendant should have the right to sell said lands, and out of the proceeds thereof to pay said Wright the balance that might be due him; that in pursuance of said

contract and agreement, said Wright did upon said day loan to defendant said sum of twenty-two hundred and eighty dollars, and defendant paid the same to said Benedict, in extinguishment of his said debt to him, and said Benedict executed a deed of said lands to said Wright, to be held by him as said mortgage security, and in no other way; which deed was taken and received by said Wright as said mortgage, and in no other way; and also to secure to said Wright the further sum of one hundred and twenty dollars as payment for Wright's expenses and trouble in obtaining said deed, and furnishing said money; making in all the sum of twenty-four hundred dollars, which defendant was on said day indebted to said Wright, and to secure the repayment of which, upon the terms aforesaid, said deed was to be so held as such mortgage by said Wright, and which he yet holds as such mortgage, and in no other way; that said land, at the time of the execution of said deed to said Wright, was of the value of four thousand dollars; that the defendant at the time of said agreement between himself and said Wright, and long prior thereto, was, and has been, and now is, in the exclusive, peaceable possession of said lands, as his own, living thereon with his family; and such possession has been uninterrupted, and continues until the present time, defendant having made lasting and valuable improvements on the same; that defendant on the 6th day of November, 1866, paid said Wright one hundred dollars, and on the 26th day of November, 1867, paid him the further sum of two hundred dollars, and on the 30th day of March, 1868, paid him the further sum of seventy-eight dollars and eighty-five cents; all of which was paid by defendant, and received by said Wright, as interest on said sum so loaned defendant by Wright; and that on the 25th day of June, 1868, defendant tendered to and offered to pay said Wright the sum of five hundred dollars on the principal of said debt owing by him to said Wright, which said Wright refused to accept; that said defendant has not been able to pay said Wright his said debt, any further or sooner than he has as above set forth

offered to do; and said Wright has never asked or demanded the repayment to him of said money from said defendant; that about the 8th day of May, 1868, said Wright and wife executed a deed of the said lands to the plaintiff herein, who had full knowledge of said possession thereof by the defendant, and of the said agreement between the defendant and said Wright; which deed is the pretended title by which the plaintiff claims to recover in this action; and at said last mentioned day said plaintiff executed a mortgage upon said lands to said Wright for the sum of twenty two hundred and seven dollars and fifty cents; that said land, at the time of the execution of said deed to the plaintiff, was, and is now, worth six thousand five hundred dollars; that defendant is now, and has ever been, ready and willing to fulfil in all respects the terms of his said agreement with said Wright; wherefore defendant prays that said Wright be made a party hereto; that said deed to said Wright be decreed to be a mortgage, to be held by said Wright as security for the repayment to him of such sums of money as may be due him from defendant, and in no other right; and that the said deed to the plaintiff herein, and the mortgage executed by him to said Wright, be decreed to be null and void, and be cancelled and annulled, and for other proper relief.

"Third. And for third and further cause of defense to plaintiff's complaint, defendant says that the right by which plaintiff claims the recovery of the lands mentioned in his complaint is derived by and through a deed for the same, executed by Alfred Wright to him; that said Wright, at the time of the execution of said deed, and prior thereto, had and held the legal title to said lands as the trustee of this defendant, who was then, and is now, the real owner of the same; that the consideration for said lands was paid by this defendant to Alvah Benedict, who then held the legal title thereto, and from whom defendant had theretofore purchased said lands; and the deed therefor was then taken by Wright, in his own name, from said Benedict, under an agreement theretofore made by and between said Wright and defendant,

without any fraudulent intent, that Wright should hold the legal title to said lands as the trustee of this defendant, and convey the same to him (defendant), upon the payment to said Wright of twenty-four hundred dollars, for which amount the defendant was then indebted to him; that said money was to be paid to said Wright at such times and in such sums as should be found convenient for defendant to pay from the proceeds of said farm, in the meantime the defendant paying interest to said Wright on such sums as should remain unpaid; and that in case the defendant desired to sell said farm at any time, said Wright should convey the land to the purchaser upon payment to him (Wright) of the amount that might be due from defendant; that at the time said land was so conveyed to said Wright, it was of the value of four thousand dollars, and at the commencement of this suit, and now, the same is of the value of six thousand dollars; that ever since the said conveyance to said Wright, the defendant has been in the exclusive and uninterrupted possession of said land as his own, living thereon with his family, farming and cultivating the same, and has made lasting and valuable improvements upon said farm, and was in such possession thereof at the time said Wright executed the deed to plaintiff, by which he claims the recovery of said lands in this suit, which deed was executed by said Wright in violation of said trust; that defendant, in pursuance of said agreement with Wright, paid him on the 6th day of November, 1866, one hundred dollars, and on the 26th day of November, 1867, the further sum of two hundred dollars, and on the 30th day of March, 1868, the further sum of seventy-eight dollars and eighty-five cents, all of which sums were so paid by defendant and received by said Wright as interest on the said twenty-four hundred dollars due him from defendant; that said Wright has never demanded the payment of the principal of said sum due him from defendant, but defendant offered, on the 25th of June, 1868, to pay him thereon the sum of five hundred dollars, which he refused to accept; that defendant has been

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unable to pay said Wright, from the proceeds of said farm, any faster than he has so offered to do; that at the time the plaintiff received said deed from said Wright, he executed a mortgage of said premises to Wright for the sum of twenty-two hundred and seven dollars and fifty cents, which is now of record an incumbrance thereon; wherefore the defendant asks that said Wright be made a party hereto; that said deed from Wright to the plaintiff and the mortgage from plaintiff to Wright be decreed void and cancelled and annulled; and that said Wright be decreed to hold the said lands in trust for defendant under said agreement; and for other proper relief."

A separate demurrer was filed to each paragraph of this answer, which was overruled and exception taken. A reply of general denial was then filed to the answer. Verdict for the defendant (appellee), with the following questions to, and answers of, the jury, was returned: 1st. "State the whole terms, in every particular, of the contract or agreement (if any there was) made between Benedict and defendant, Cole, in relation to the purchase or sale of the lands in suit." Answer: "Mr. Benedict offered Cole said land if he, Cole, would pay Benedict the sum of two thousand dollars. Cole would pay seven per cent. interest on principal, and about one hundred and fifty dollars per annum, if Cole could make it off of the farm; and if Cole could not make the payment, Benedict would give Cole further time. Cole took possession and held said land under said contract."

2d. "State the whole terms, in every particular, of the contract (if any there was) made by Wright and Cole, at or before the time of making the deed by Benedict to Wright, and when and where the same was made." Answer. "The agreement made between Cole and Wright was at Wright's house in June, 1865. Wright agreed to let Cole have the money to pay Benedict for the same, and Wright agreed to give Cole a reasonable time to pay it, if he would pay the interest. And Cole was to secure Wright on the land."

3d. "Whose money was paid by Wright to Benedict for

the farm in suit?" Answer. "Wright's money was paid to Benedict for Cole."

4th. "What contract (if any was made) was there between Wright and Cole, before the deed was made by Benedict to Wright, as to said deed being a mere mortgage or security? State fully every particular in relation to the deed being a mere mortgage or security." Answer. "There was no contract between Wright and Cole, as to how Wright was to be secured, only that Wright was to be secured for the payment of the money on the land."

5th. "State whether or not the contract or arrangement between Wright and Cole (if any there was) was of such a character as that Cole could have his choice, either to pay Wright back the money which he paid to Benedict for the land, or to abandon said land to said Wright." Answer. "No agreement by the parties, for Mr. Cole to abandon the farm."

6th. "Did Alvah Benedict and the defendant, Cole, abandon the contract or agreement (if any there was), existing between them, for the purchase of said land in controversy, before the arrangement entered into between Wright and Cole?" Answer. "No."

There was a motion by the plaintiff for judgment in his favor on these answers, notwithstanding the general verdict, which was overruled; and we approve of this ruling; for there was no substantial difference between these special findings or answers and the general verdict. There was a motion asking the court to require the jury to make the answer to the fourth interrogatory more full and explicit. Without ruling as to whether the first, second, and fourth questions were proper, under the code, we hold that the answer to the fourth interrogatory was reasonably full and explicit, and that the court committed no error in overruling this motion. A motion was made for a new trial for the statutory, and some unstatutory, reasons, which was overruled, and exception taken, and judgment rendered on the verdict. This was not error.

The errors assigned are thirteen, but they all arrange themselves, or are comprehended under, three.

1. The overruling the demurrers to the answer.
 2. The overruling the plaintiff's motion for judgment for him, notwithstanding the general verdict.
 3. The overruling the plaintiff's motion for a new trial.
- Under these heads all the assignments fall. We hold that the answer was a good defense to the action, and that the demurrers to each paragraph were properly overruled.

We have carefully examined the evidence, all of which is in the transcript, and are clearly of the opinion that it was all admissible under the issues formed, and fully warrants the verdict, and that there was no error in admitting any part of it. We have above disposed of the question arising under the second assignment of errors, to wit, that of asking a judgment for the plaintiff on the answers to interrogatories, notwithstanding the general verdict.

The instructions given by the court to the jury were as follows:

"This is an action brought by the plaintiff against the defendant, to recover a farm described in the complaint. It is admitted that the plaintiff has a regular paper title to the land, but the defendant denies that the plaintiff is the owner of the land in equity, and claims that in equity the defendant is the owner of the land, and that by law he is entitled to set up his equitable title as a defense to the plaintiff's action; and therefore the question which you are to try is whether the defendant has made out his alleged equitable defense; and if you find that he has not made out his equitable defense, your verdict should be for the plaintiff. The defendant, Cole, alleges as an equitable defense to said action, that on the 15th day of May, 1863, one Alvah Benedict, of the State of New York, was the owner of the land in controversy; that at that time said Benedict made a parol contract with defendant Cole, by which he agreed to sell to said defendant, for the sum of two thousand dollars, said land; that the defendant was to take possession of said land, and live on the same

as his own; that he was to have time to pay for said land by making the money from said farm; that said defendant went into possession of said land, and cultivated said land, and made beneficial improvements on said land; that said possession was taken in pursuance of said parol contract, and with the consent of said Benedict; that said plaintiff has remained in possession of said land from the time he took possession of the same until this time, all the time claiming to be the equitable owner of said land; that a short time prior to the first day of July, 1865, and while the defendant was in the possession of said land, the said Benedict became desirous to get his pay for said land from said defendant, and insisted that said defendant should give the possession of said land to him, or pay him for the same according to the parol contract. The defendant, Cole, was without means to pay the purchase-money for said land; he then applied to one Wright to loan him the money to pay said Benedict for said land; that said Wright agreed to furnish the money to pay the amount due said Benedict on said land, and that he would wait on said Cole, and give him further time, by Cole paying interest, and that he would take a deed from said Benedict for said land, and hold the same as a security for the money he should pay said Benedict; that on this arrangement, said Wright paid to said Benedict the amount going to him for said land, the amount of principal and interest then due said Benedict for said land being about twenty-two hundred and eighty dollars, on the first of July, 1865; that said Benedict then executed to said Wright a deed for said land at that date.

“It is further claimed that said Benedict did not pretend to sell said land to said Wright, nor did said Wright pretend to purchase said land; and that said Cole did not pretend to sell said land to said Wright, but that said Wright should advance and pay to said Benedict the amount due said Benedict for said land, according to the parol contract made between Benedict and Cole; that Wright was to hold the title as security for the money he so paid to said Benedict,

and that Cole was to pay Wright interest on the money so paid to said Benedict, and that he was to have time to pay Wright in payments the amount he so paid to said Benedict. Defendant, Cole, further alleges, that after Benedict conveyed said land to said Wright, and before said Wright conveyed said land to said plaintiff, as heretofore stated, he paid to said Wright, at different times, money to the amount of three hundred dollars, and that said Wright received said money in pursuance of the understanding that said Cole was to pay said Wright the money he paid said Benedict on said land, and did apply said payments on the interest of said money so paid said Benedict by said Wright.

“That afterward, and while the defendant was in possession of said land, to wit, on the 8th day of May, 1868, said Wright conveyed said land to the plaintiff; that said conveyance was made without the consent of the defendant, Cole, and was made while the defendant was in full possession of said land, and with the full knowledge on the part of the plaintiff of the rights of the defendant.

“To the statements of the defendant so alleged, the plaintiff denies the same to be true, and he alleges that the conveyance made by Benedict to Wright was a purchase of the land, and that it was so understood by defendant, Cole, at the time; and that he, said Wright, did not agree to hold said land and the title, under his deed, as a security for the money he paid to said Benedict; that he, said Wright, did not agree to hold said land for the benefit of said Cole, and did not agree that said Cole might redeem the same; and that said Wright never received any money of said Cole, to apply as interest on the amount he paid to said Benedict. Whether any of the alleged statements of said parties are true, or in substance true, it is for you to determine. The Court gives you the following special instructions upon the points of law, deemed by the court to arise in the case:

“If you find that on the 15th day of May, 1863, one Benedict was the owner of said land described in plaintiff's complaint; that at the time he made a parol contract to sell and

convey said land to the defendant, Cole, for the sum of two thousand dollars, and that the defendant was to have time to pay for the same, by paying interest; that the defendant was to go into possession of said land as such purchaser, and that he did go into possession of said land in pursuance of said parol contract, and has made beneficial improvements on said land, and afterwards, while said defendant was in possession of said land, the said Benedict desired to have his pay for said land, and it was agreed between said Cole and one Wright that said Wright should advance the amount that was then due said Benedict on said land, and that said Benedict should convey said land directly to said Wright, and that said Wright should hold the title to said land as a security for the money so advanced and paid to said Benedict, and that said Cole should have the right to redeem said land; and said Wright did, in pursuance of such understanding and agreement, advance to said Benedict the amount due him on said land, and said Benedict did convey to said Wright said land; that said Cole desired said Benedict so to convey, and that said Benedict made said conveyance to said Wright in order to carry out the contract made between Benedict and Cole; the transaction, as between Benedict and Cole, is a compliance on the part of Benedict with the parol contract to convey said land; and as between Wright and Cole, the same is a mortgage on the part of Cole of said land to said Wright, and said Wright cannot set up said deed as an absolute conveyance. And if you further find that said Wright conveyed said land to said plaintiff, Church, and said plaintiff had notice of the nature of the title of said Wright, or you shall find that Cole was in possession of said land, claiming to be the owner, the plaintiff is bound to take notice of Cole's claim to the land, and your verdict should be for the defendant.

"If the jury find, from the evidence, that on the 15th day of May, 1863, one Alvah Benedict was the owner of said land in controversy, and at that time he made a parol contract with the defendant Cole to sell and convey to said Cole

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said land for the sum of two thousand dollars; and that said land was to be paid for on time payments; and that said Cole was to have the possession of said land, and that in pursuance of said contract Cole took possession of said land under said parol contract; and that afterward, in May or June, in the year 1865, and while defendant was in possession of said land, and the payments had become due from Cole to Benedict, and Cole requested one Wright to pay to said Benedict the purchase-money due said Benedict for said land, and give him (Cole) time to pay him back said money, and if he (Cole) could not pay him back said money, he desired a chance to sell the land; and Wright afterward went and paid said Benedict the sum due from said Cole to said Benedict on said land, and said Benedict received the said money and executed a deed to said Wright for said land, which deed was executed on the first day of July, 1865; and you further find that after said Wright had procured a deed for said land by a loan from Wright to Cole; and that the deed from Benedict to Wright, as between Wright and Cole, was but a security in the nature of a mortgage; and said Cole paid said Wright money at different times to apply on account of the money so paid by said Wright to Benedict at defendant's (Cole's) request, and said Wright received the same, and did apply the same on the interest due him on account of said money so paid by him to said Benedict, and gave a receipt to that effect, he is now estopped from saying that Cole, at the time he paid said money to said Benedict, was not the equitable owner of said land; and by paying said money, at Cole's request, to Benedict, and afterward receiving interest on the same from Cole, he is estopped from saying that the money he paid Benedict was not a loan from him to Cole, and that he held said title as a security for the money he paid said Benedict, at Cole's request; and that the transaction, as between Cole and Wright, was, and you further find, that after said Wright received said deed from said Benedict, and after he had received payments or interest from said Cole on account of

the money he paid said Benedict at the request of said Cole, he conveyed said land to the plaintiff; and during all this time said defendant was in possession of said land, claiming the same as his own, the said plaintiff cannot be considered in law a purchaser without notice of Cole's right to the land, and your verdict should be for the defendant.

"If you find that on the — day of April, 1863, one Alvah Benedict owned the land in controversy, and at that time he made a parol contract to sell said land to the defendant Cole on time payments, and for the sum of two thousand dollars and interest; and the said Cole was to have possession of the same; and that in pursuance of said contract, Cole took possession of said land under said contract; and that afterward, in May or June, 1865, the purchase-money became due to said Benedict; and that said defendant Cole, being in possession of said land, and Cole being unable to pay for said land, and abandoning all claim to said land, and so informed said Wright, and authorized and directed said Wright to deal with said Benedict as the full and complete owner of said land; and said Wright did purchase said land of said Benedict, and did pay him for the same, and did take a deed for said land from said Benedict, and there was no agreement or understanding that said Cole was to have the right to redeem said land; and that said Cole and said Wright have all the time since treated said Wright as the absolute owner of said land; and the said Cole had no right to redeem said land; in case you so find, your verdict will be for the plaintiff. The court is the judge of the law; you are the judge of the evidence. In determining the questions in the case you will carefully look at all the circumstances in the case, the situation of the parties, the manner in which they have acted toward each other at the time of the original transaction, as well as any subsequent conduct of said parties. You will determine the case upon a preponderance of the testimony. The defendant must produce a preponderance of testimony, or the evidence in the case

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must satisfy you that the preponderance is on the side of the defendant, or else you must find for plaintiff."

These instructions were clearly right, and the court committed no error in giving them. A deed made under the circumstances shown in this case must be held and treated as a mortgage or security for money. *Slaughter v. Foust*, 4 Blackf. 379; *Watson v. Mahan*, 20 Ind. 223; *Russell v. Southard*, 12 How. U. S. 139; *Heath v. Williams*, 30 Ind. 495; *McBurney v. Wellman*, 42 Barb. 390; *Zimmerman v. Marchland*, 23 Ind. 474; *Murray v. Walker*, 31 N. Y. 399; *Griffin v. Coffey*, 9 B. Mon. 452; *Glidewell v. Spaugh*, 26 Ind. 319; *Boyd v. McLean*, 1 Johns. Ch. 582; *Davis v. Stone-street*, 4 Ind. 101; 2 Washb. Real Prop. 490.

The motion for a new trial sets up, as one of the causes for it, that the defendant was allowed by the court to open and close to the jury, over the objection of the plaintiff; but it does not appear in the record that the objection was made, only as it is assigned as a cause for a new trial in that motion; nor is it raised or presented in the appellant's brief. The record not showing that the objection was in fact made, we cannot notice it. The plaintiff asked numerous instructions, but they were all directly the negatives of the instructions given, and often duplicates of themselves, and were properly refused by the court. Substantial justice has been done between the parties, and we cannot reverse the judgment for technicalities. 2 G. & H. 278, sec. 580.

The judgment below is affirmed, at the costs of the appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellant.

H. D. Wilson and *J. D. Osborn*, for appellee.

RILEY and Another v. BUTLER.

ASSIGNMENT OF ERROR.—*Sufficiency of Complaint.*—*Jurisdiction.*—The want of sufficient facts in a complaint to constitute a cause of action, or the fact that the complaint shows the court had no jurisdiction over the subject-matter of the action, may be assigned as error in the Supreme Court, although no demurrer was interposed in the lower court.

SAME.—*New Trial.*—A cause for a new trial not presented in the court below cannot be considered in the Supreme Court.

ESTOPPEL.—*Sunday.*—Admissions which would otherwise operate as an estoppel, if acted upon, are not rendered inoperative because made on Sunday, no contract being then completed.

TRIAL.—*Witnesses.*—Under our practice, the court or jury may find the affirmative of an issue, notwithstanding there may be but one witness on each side, and the evidence be conflicting.

SURETYSHIP.—*Issue.*—Where no pleading raises the question of suretyship, the court need not make an order for the levy of the execution first on the property of the principal.

APPEAL from the Harrison Common Pleas.

DOWNEY, C. J.—Suit by Butler as indorsee of Philip Smith, against Thomas Riley and John H. Riley, on a promissory note. The defendants answered in three paragraphs. The first alleges that the note was executed by Thomas Riley, as principal, and John H. Riley, as security, to the payee, for the last payment of the purchase-money of two certain tracts of land, conveyed by said payee to said Thomas Riley by general warranty deed; that there was a vendor's lien on one of said tracts in favor of one Cline, who had conveyed that tract to Smith, for the sum of six hundred and five dollars and seventy-five cents; that Cline's administrator, in a suit against Smith and said Thomas Riley, had recovered judgment against Smith, establishing said lien against the land to the amount yet due to Smith from Riley; that Thomas Riley had paid on said judgment the sum of three hundred and sixteen dollars, leaving two hundred and forty-six dollars and sixty-six cents of the judgment yet due and unpaid.

The second paragraph, which is an answer and also a

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cross complaint, sets up the same facts, and in addition thereto, alleges that said Smith is insolvent, and prays that the plaintiff be enjoined from collecting said note until said incumbrance shall have been removed, and he be repaid the said sum of three hundred and sixteen dollars so paid by him on said judgment, etc.

The third paragraph is a general denial.

The plaintiff replied to the first and second paragraphs: First, a general denial; second, that the said claim of Cline was not, at the time of the execution of said note, a lien on said land, but had been, before that time, paid off by said Smith; third, that before the indorsement to him of the note sued on, he informed the said Thomas Riley that he intended to buy the note and procure the assignment thereof to himself, if he could be assured that the same was a valid obligation against him and his said co-defendants; and that thereupon the said defendant, Thomas Riley, informed the plaintiff that said note was a valid and subsisting obligation against said defendants; that he might buy the same with safety; and that relying on said statements and promise of said defendant, he purchased said note, for a full and valuable consideration, and procured the assignment thereof to himself; wherefore, etc.

There was a trial by the Court, finding for the plaintiff, motion for a new trial overruled, and judgment rendered on the finding.

The first question argued is as to the sufficiency of the complaint. But we do not see that this question is raised by the assignment of errors. It is not assigned that the complaint is not sufficient. If it were, we could consider it; for a substantial defect in the complaint, in showing a want of jurisdiction of the court over the subject-matter of the action, or in failing to state facts sufficient to constitute a cause of action, is not waived by failing to demur. But to raise this question, it must be assigned for error. It is assigned for error that the court improperly overruled the defendant's demurrer to the complaint. But this cannot be, for there

was no demurrer to the complaint. There was a demurrer by the plaintiff to the first and second paragraphs of the answer, which was overruled; but it is not assigned for error that the court did not, on this demurrer, adjudge the complaint insufficient.

The other questions discussed in the brief of appellant's counsel arise under the allegation that the court erred in refusing to grant a new trial. The only reasons given in the written motion for a new trial, why the same should have been granted, were that the finding of the court was not sustained by sufficient evidence, and was contrary to law.

It is urged that the indorsement of the note should have been stamped with a United States internal revenue stamp. But this question cannot be properly presented to us, because it was not made a reason for granting a new trial.

With reference to the evidence in support of the special paragraphs of the answer, counsel for the appellee insists that as Thomas Riley swore that he had no notice of the lien of Cline at the time of his purchase, this shows that Riley could not have been affected by the lien, and therefore his defense, as set up in those paragraphs, was not made out.

We think the learned counsel in assuming this position has overlooked the qualification of that rule which maintains that if the purchaser receive notice of such an equity at any time before the payment of the purchase-money by him, it is in time to charge him with the equity, at least to the extent of the unpaid purchase-money. But the decision of this point against the appellee does not dispose of the case; for admitting that the facts alleged in the first and second paragraphs were made out in evidence, still the second and third paragraphs of the reply were pleaded in avoidance of those paragraphs of the answer, and if they, or one of them, was found true, the plaintiff was entitled to judgment.

Butler and Thomas Riley both testified about the matter of estoppel set up in the third paragraph of the reply. Butler said that Riley told him "that the note was all right; that there was no mortgage or lien against the land; that he

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had examined the records and could find nothing against the land; that Smith had told him there was nothing against the land;" and that afterward he purchased the note, relying on their statements, etc. Riley stated that Butler asked him if the note was all right; he said, "'I reckon it is,' but in a moment or two afterward, and almost in the same breath, he added: 'Well, I owe the money, and it is all right, if there is no mortgage or lien against the land.'" In other respects he agreed with Butler in his testimony on this point. They both agree in stating that the conversation was on Sunday. It is not shown that the note was purchased by Butler on Sunday.

Upon this evidence it is urged by counsel for the appellants, that the fact that this conversation was on Sunday destroys its effect as an estoppel. If so, it is because it was a violation of the Sunday law, which is found on p. 481, 2 G. & H. However much such a conversation was out of place on Sunday, we think it was not a violation of that statute. It was not "common labor;" nor was it shown to be the "usual avocation" of the parties. We do not, therefore, think that the fact that the conversation took place on Sunday, when no contract was then made, could have the effect to prevent the plaintiff from relying upon it as an estoppel.

But it is further contended by counsel for appellants, that as the testimony of Butler and Thomas Riley was contradictory, the court should have found for the defendants, instead of finding for the plaintiff. It is contended that the court should have applied the rule which was formerly applied in proceedings in chancery, when, if the defendant denied any charge in the bill, in his answer, and the plaintiff could only bring one witness to the contrary, the case must be decided, on that point, at least, for the defendant.

We do not think this position can be sustained. We think, under our practice, where parties, or any others, testifying in a cause, make contradictory statements, that the court or jury trying the cause may find the affirmative of the issue,

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notwithstanding there may be but one witness on each side, and their evidence be in conflict.

But it is further contended by counsel for the appellants that the court should have made an order for the levy of execution first on the property of Thomas Riley, before the property of John H. Riley should be levied on. We think not. John H. Riley filed no pleading raising the question of suretyship between him and Thomas Riley, as required by sec. 674, p. 308, 2 G. & H. There was no error in this.

The judgment is affirmed, with five per cent. damages and costs.

S. K. Wolfe, J. E. McDonald, and E. M. McDonald, for appellants.

G. V. Hawk, W. W. Tuley, and T. C. Slaughter, for appellee.

SHAFFNER, Administrator, v. BRIGGS and Another.

GUARDIAN'S SALE.—*Judgment.*—*Sale on Execution.*—Where, upon the petition of his guardian, the court, on the 15th day of February, 1868, ordered the sale of the land of a minor, and A. recovered a judgment against the minor on the 19th day of February, 1868, and purchased the land at sheriff's sale under said judgment on the 11th day of April following; and seventeen days later B. purchased the land from the guardian, paying one-half the purchase-money and securing the remainder in one year, and the court approved the sale at the May term, 1868;

Held, that the title to the property was in A.

Held, also, that the order for the sale of the land did not operate *in presenti*, and convert the land into assets in the hands of the guardian so as to prevent the judgment from operating as a lien on the land; nor did the title of the purchaser at guardian's sale relate back to the order of sale, so as to prevent any intervening liens or rights being acquired.

LANDS OF INFANT.—*Execution.*—The lands of an infant may be sold on execution against him.

APPEAL from the Warren Circuit Court.

WORDEN, J.—This was an action by the appellant against

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the appellees to recover possession of certain real estate in Warren county, and to quiet the plaintiff's title thereto.

The defendant, John Briggs, answered, first, by general denial; and secondly, in substance as follows: That Aaron Briggs, who had been the owner of the land, was a minor; that his guardian filed a petition in the court of common pleas of said county asking for an order for a sale of the land for the payment of the debts of said Aaron, and that such proceedings were had thereon as that on the 15th day of February, 1868, the said court ordered the sale of the land for that purpose; that afterward, on the 28th of April, 1868, the said John Briggs purchased the land of the guardian, in pursuance of the order of the court, for the sum of six hundred and ninety-two dollars and fifty cents, that being the appraised value thereof; that he paid down the one-half of the purchase-money, and gave his note, properly secured, for the residue, payable in a year with interest, and took from the guardian a certificate of purchase; that at the May term, 1868, of the said court of common pleas, the guardian reported the sale to the court, and it was by the court confirmed; that upon the note falling due, he paid the same to said guardian, who reported the payment to said court, and the court, at its May term, 1869, ordered the guardian to execute to said John a deed for the premises, which was done, but the deed, through the forgetfulness and omission of the attorney of the guardian, was not presented to the court for its approval and confirmation; that by virtue of his said purchase, the said John took possession of the premises and has since occupied them; that the only title of the plaintiff to the land is by virtue of a purchase thereof at a sheriff's sale on the 11th of April, 1868, upon an execution issued upon a judgment recovered in the same court on the 19th of February, 1868, in favor of the plaintiff and against the said Aaron Briggs and two other persons named, which land was levied on and sold as the property of said Aaron Briggs; that the plaintiff well knew, before he bought said land at sheriff's sale, that said court had, prior to the recov-

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ery of the judgment, ordered the sale of said land by said guardian for the purpose aforesaid; wherefore, etc.

To this paragraph the plaintiff filed a demurrer, assigning for cause a want of sufficient facts, etc., which was overruled, and the plaintiff excepted, and declining to reply, final judgment was rendered for the defendants.

The only question presented by the record is whether the ruling upon the demurrer was correct. No point is made on the want of an approval by the court of the guardian's deed, and we shall consider the case as if that deed had been duly approved by the court.

It will be seen by the answer that the court ordered the sale of the land by the guardian on the 15th of February, 1868; that the plaintiff's judgment was recovered four days thereafter, viz., on the 19th of the same month; that on the 11th of April, 1868, the plaintiff purchased the land on his execution; that seventeen days thereafter, viz., the 28th of April, 1868, the defendant, John Briggs, made his purchase from the guardian, and the purchase was approved at the May term of the court, 1868. On these facts we think it quite clear, and therefore decide, that the title to the property is in the plaintiff.

By his judgment, the plaintiff acquired a lien on the land on the 19th of February, 1868. At that time there had been an order for the sale of the land by the guardian, but that order did not prevent the plaintiff's lien from attaching. The statute provides, that "all lands of the judgment-debtor, whether in possession, reversion, or remainder," shall be liable to be sold on execution; and that all final judgments of the supreme and circuit courts, and courts of common pleas, for the recovery of money or costs, shall be a lien, for the period of ten years, upon real estate liable to execution in the county where the judgment is rendered. 2 G. & H. 263, 264, secs. 526, 527. This statute is very broad. It subjects "all lands" of the judgment-debtor, without exception, to sale on execution, and makes the judgment a lien

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on real estate in the county; that is, all the real estate "liable to execution."

At the time of the recovery of the judgment, the land was as much the property of the judgment-debtor as it ever was, although there had been an order for the sale thereof by his guardian. It is contended by counsel for the appellees that upon the order being made for the sale of the land by the guardian, "the order operated *in presenti*, and in contemplation of law the lands were reduced to and converted into assets in the hands of the guardian so as to prevent the judgment from operating as a lien thereon." This position, in our opinion, is not well taken.

In the case of *Erb v. Erb*, 9 Watts & Serg. 147, it was held that "upon a sale of real estate of an intestate by order of the orphans' court, for the payment of debts, the title remains in the heir until the contract of sale be executed by the payment of the purchase-money and the execution of the deed; hence, upon the death of the heir subsequently to the confirmation of the sale by the court, and prior to the execution and delivery of the deed, his interest will descend as land, and not as money."

The same doctrine is maintained in the case of *Biggett's Estate*, 20 Penn. St. 17, where LEWIS, J., in delivering the opinion of the court, says: "A conversion of real into personal estate, by act of the law, differs from a conversion by act of the party. In the latter case, where the conversion is the object of the owner, the result is produced as soon as the contract of sale is made. In the former, where payment of debts or partition, and not conversion, is the object, the transmutation is but the unavoidable result of the proceedings, and takes place only when the estate is completely vested in the vendee and the purchase-money paid or secured."

Again, it is claimed by the appellee, that the title of a purchaser at guardian's sale relates back to the order of sale so as to prevent any intervening liens or rights being acquired. We cannot give our assent to this proposition. No

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case has been cited, and we are not aware of any, in which it has been held that a deed for land, whether purchased from the owner or under judicial proceedings, relates back to a time anterior to the contract of purchase, where no lien had been acquired on the property.

In *Bellows v. McGinnis*, 17 Ind. 64, it was held that the title of a purchaser at an executor's sale related back to the confirmation of the sale, and it was said that "perhaps the deed, when executed, would relate back to the time of the sale by the executor;" but this point, not being involved in the case, was not decided.

The case of *Jackson v. Davenport*, 20 Johns. 537, cited by counsel for appellees, holds that "the doctrine that a deed executing a power, generally speaking, relates back to the instrument creating the power, so as to take effect from the original deed, is a fiction of law for the advancement of right, and is not to be applied to the injury of a stranger by defeating his lawful intervening rights."

The plaintiff in this case had not only acquired a lien on the land by his judgment, but he had purchased it at sheriff's sale before the defendant, John Briggs, made his purchase from the guardian; and there can be no doubt of the validity of the plaintiff's title, unless the previous order of the court for the sale of the land in some way prevented the lien of the judgment from attaching, or the land from being sold on execution. We think the order had no such effect.

Again, it is urged, that the land of an infant cannot be sold on execution against him, but that his guardian must proceed to convert it into money to pay the judgment. We are of a different opinion. On the facts shown in the answer, the title to the land is in the plaintiff, and the demurrer to the answer should have been sustained.

The judgment below is reversed, with costs.

J. A. Stein and L. T. Miller, for appellant.

J. H. Brown, for appellees.

86	80
199	277

PORT and Others v. RUSSELL and Others.

BILL OF EXCEPTIONS.—*Time of Filing.*—Where time is given extending beyond the term, in which to file a bill of exceptions, it must be filed within the time limited, or it will constitute no part of the record; and a bill of exceptions is no part of the record, unless the record shows when it was filed.

TURNPIKE.—*Injunction.—Directors as Contractors.*—Where a complaint was filed to enjoin the directors of a gravel road company from paying any money on a contract for the construction of the road, and the county treasurer from collecting the taxes, alleging fraud, irregularity, and unfairness, and that the contracts were given to two persons, one of whom was a director of the company, and that the other had an illegal and corrupt understanding with the directors that he was to share the profits with them;

Held, that a director of an incorporated company cannot become a contractor with the company, nor can he have any personal or pecuniary interest in a contract between a company of which he is a director and a third person.

PLEADING.—*Argumentative Denial.*—Where a general denial has been filed as an answer, another paragraph of answer, which contains nothing but an argumentative denial and facts which could have been proved under the general denial, should be stricken out on motion; but a judgment will not be reversed for an error in this matter, where a demurrer has been sustained to such a paragraph.

APPEAL from Fayette Common Pleas.

BUSKIRK, J.—This was a proceeding instituted by the appellees to enjoin the appellants from paying any money on a contract for the construction of a gravel road. There were seventeen plaintiffs, who allege that they were tax payers and owners of real estate, and had been assessed for the construction of said road. The defendants were the directors and officers of the College Corner and Western Gravel Road Company. A temporary injunction was granted by the judge in vacation.

The defendants moved the court, in term time, to dissolve the injunction, which was overruled, and an exception was taken. The defendants then moved the court to strike out portions of the complaint, and this was overruled, and an exception taken. The defendants then demurred to the complaint, which was overruled, and an exception taken.

The defendants then answered in three paragraphs, and a

demurrer was filed to the second and third, and was sustained, and an exception taken.

The cause being at issue on the general denial, was put to trial before a jury, and some ten interrogatories were put to the jury and by them answered; which finding of the jury the defendants, at the proper time, asked the court to set aside, which the court refused, and defendants excepted. And the court, upon the answers of the jury to the interrogatories, rendered final judgment and perpetually enjoined the payment of the money upon the said contracts. A motion to set aside the finding of the jury and the judgment of the court was then made, overruled, and excepted to.

A motion for a new trial was made, overruled, and excepted to; and an appeal was prayed and granted, and thirty days' time was given the defendants, in which to prepare and file bills of exceptions. This was on the 25th day of December, 1869. It further appears from the record, that the bill of exceptions was not filed until the 29th day of January, 1870, which was more than thirty days from the time of granting the leave.

There are twenty-one assignments of error, but none of them are available here but the nineteenth and twentieth, which are based upon the action of the court in overruling the demurrer to the complaint, and in sustaining one to the second and third paragraphs of the answer. All the other errors assigned must be reserved by a bill of exceptions. It is a well settled rule of practice in this court, that where time is given extending beyond the term, in which to file bills of exceptions, they must be filed within the time limited, or they will constitute no part of the record; and a bill of exceptions is no part of the record, unless the record shows when it was filed. See *Simonton v. The Huntington, etc., Co.*, 12 Ind. 380; *Peck v. Vankirk*, 15 Ind. 159; *Lake Erie, etc., R. R. Co. v. Loveland*, 14 Ind. 291; *Roloson v. Herr*, 14 Ind. 539; *Terre Haute Gas Co. v. Teel*, 20 Ind. 131; *Brouse v. Price*, 20 Ind. 216; *Moss v. Kendall*, 20 Ind. 485; *Swinney v. Nave*, 22 Ind. 178; *Farnsworth v. Coquillard's*

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Adm'r, 22 Ind. 453; *Cox v. Blair*, 19 Ind. 390; *Noble v. Thompson*, 24 Ind. 346; *Sherman v. Crothers*, 25 Ind. 417; *McElfatrick v. Coffroth*, 29 Ind. 37; *Vanness v. Bradley*, 29 Ind. 388; *Fitzenrider v. The State*, 30 Ind. 238.

The first available error is based upon the action of the court in overruling the demurrer to the complaint. Did the facts stated in the complaint constitute a good cause of action, and entitle the plaintiffs to the relief prayed for? The complaint and exhibits cover fifty-five pages of the record, but we will try to give an abbreviated and condensed abstract of the principal facts stated, that will present the grounds upon which the action was based, and render our ruling intelligible.

The complaint alleges that in March, 1867, the commissioners of Union county, Indiana, granted a permit to organize a gravel road company under, and by virtue of, the act of 1865; that in April, 1867, the company was organized, elected officers, and adopted articles of association and by-laws, which were filed in the recorder's office of Union county; that surveys and estimates were made which required a road to be made with gravel, sixteen feet wide, fifteen inches deep in the center, and nine inches deep at the sides, and upon which surveys and estimates of the engineer the taxes were levied by the auditor of said county, and assessed and apportioned, which was in all things in conformity with the laws and the said articles of association; that the aggregate sum assessed against the plaintiffs amounted to \$—; that the defendants, as individual stockholders, were opposed to the construction of said road, and had done all in their power to prevent its construction, and to that end had instituted suits to have the corporation dissolved, upon the ground that it had not been legally organized; that since their election as directors and officers, and with the open and avowed purpose of defeating the construction of the said road, and with the express design of defeating the objects and purposes for which the said company had been organized, they had fraudulently confederated, com-

bined, and conspired together to prevent the collection of the taxes assessed against them, and to compel the plaintiffs to pay their taxes assessed against their property; that in pursuance of such fraudulent and corrupt confederation, combination, and conspiracy, the said defendants, as such board of directors, have let the contracts for the construction of said roads, or the greater part thereof, to individual members of said board, and to others, who are parties to such fraud; that the said contracts do not comply with the requirements of said articles of association, nor with the surveys and estimates upon which said taxes were assessed and apportioned; but upon the contrary, the said contracts provide for the construction of a road of gravel of only eight feet in width, and of twelve inches of gravel in the center, and six inches at the sides, in depth; that such a road would be utterly worthless, and upon which no tolls could be legally charged and collected under the said statute, and would be a fraud upon the tax-payers along the line of the said road, and in flagrant violation of the articles of association; that in pursuance of said fraudulent and corrupt combination and conspiracy, the said defendants are procuring the satisfaction and discharge of the taxes assessed against them and their property, by means of work pretended to be done under said illegal and fraudulent contracts, and are demanding and proceeding to collect the taxes assessed against the plaintiffs, with the fraudulent design of appropriating the same to the payment of the unlawful, fraudulent, and worthless work being done under said illegal contracts; that at the letting of the said contracts it was announced and understood that the contractors should remove the earth from the gravel; and that after the making of the said contracts, the said directors had passed an order requiring the company to remove such earth, thus increasing the cost of construction about sixteen hundred dollars, and putting the same into the pockets of the contractors, one of whom was a director; and that the other had an illegal and corrupt bargain with the other directors, to share the profits with them; that the said directors were

borrowing large sums of money and rendering the company liable therefor; and that the taxes assessed against the plaintiffs were due and unpaid; and that the treasurer of said county would proceed to collect the same by distress and sale of their property, unless enjoined from so doing. The prayer of the complaint was, that the treasurer should be enjoined from collecting the said taxes; that the directors should be perpetually restrained and enjoined from paying any money to the said contractors for work done under and by virtue of said contracts, and for general relief.

Was the complaint good? We think it was. There are many allegations of fraud, irregularity and unfairness in the complaint, but we only propose to examine one objection that is urged to the legality and validity of the contracts for the construction of the road.

It is charged in the complaint that the contracts were given to two persons, one of whom was a director of the company; and that the other contractor had an illegal and corrupt understanding with the directors that he was to share the profits with them.

The question presented for our consideration and decision is, can a director in an incorporated company become a contractor with the company, or can he have any personal and pecuniary interest in a contract between the company of which he is a director and a third person? We think the law is well settled, both in England and in this country, that he cannot. In the case of *The Aberdeen Railway Company v. Blakie*, 1 Macq. Ap. Cas. 461, the House of Lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer for the supply of iron furnishings to a railway company of which he was a director or the chairman at the date of the contract, was invalid, and not enforceable against the company.

LORD CRANWORTH, in delivering the opinion of the court, says: "A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are

conducting. Such an agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, any personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform."

The three leading cases in this country are *Michoud v. Girod*, 4 How. U. S. 503; *Coal and Iron Company v. Sherman*, first published in vol. 8 Am. Law Reg. 334, and afterward reported in 30 Barb. 553; and *The Hoffman Steam Coal Company v. Cumberland Coal and Iron Company*, 16 Md. 456. In these cases will be found a full, able, and exhaustive discussion of the question, and a thorough examination of the English and American cases.

The Supreme Court of New York, in *Coal and Iron Company v. Sherman*, *supra*, say: "Nay, the rule, as applicable to managers of corporations, should in no particular be relaxed. Those who assume the position of directors and trustees, assume, also, the obligations which the law imposes on such a relation. The stockholders confide to their integrity, to their faithfulness, and to their watchfulness the protection of their interests. This duty they have assumed; this the law imposes upon them; and this those for whom.

they act have a right to expect. The principals are not present to watch over their own interests; they cannot speak in their own behalf; they must trust to the fidelity of their agents. If they discharge these important duties and trusts faithfully, the law interposes its shield for their protection and defense; if they depart from the line of their duty, and waste or take to themselves, instead of protecting the property and interests confided to them, the law, on the application of those thus wronged or despoiled, promptly steps in to apply the corrective, and restores to the injured what has been lost by the unfaithfulness of the agent."

The learned judge, in the same opinion, says: "Neither are the duties and obligations of a director or trustee altered from the circumstance that he is one of a number of directors or trustees, and that this circumstance diminishes his responsibility, or relieves him from any incapacity to deal with the property of his *cestui que trust*. The same principles apply to him as one of a number, as if he was acting as a sole trustee. It is not doubted that it has been shown that the relation of the director to the stockholders is the same as that of the agent to his principal, the trustee to the *cestui que trust*; and out of the identity of these relations necessarily spring the same duties, the same danger, and the same policy of the law. The number of directors or trustees does not lessen the danger or insure security that the interests of the *cestui que trust* will be protected. The moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and control. If five directors permit the sixth to purchase the property entrusted to their care, the same thing must be done with the others if they desire it."

All experience demonstrates that the increase of the number of the agents in no degree diminishes the danger of unfaithfulness. *Whichcote v. Lawrence*, 3 Ves. 740, was a case of several trustees. In this case Lord LOUGHBOROUGH says: "There are more opportunities for that species of

management which does not betray itself much in the conduct and language of the party when several trustees are acting together. I am sorry to say there is greater negligence where there is a number of trustees."

Judge DAVIES, in the New York case above quoted from, says: "After a most careful and patient investigation of the facts in this case, and the numerous authorities cited in the protracted and very able arguments made by the learned counsel for the respective parties in this cause, I have arrived at the conclusion, entirely clear to my own mind, that this deed of sale and contract cannot be sustained. To hold otherwise, would be to overturn principles of equity which have been regarded as well settled since the days of Lord Keeper BRIDGMAN, in the 22d of Charles II., to the present time—principles enunciated and enforced by HARDWICKE, THURLOW, LOUGHBOROUGH, ELDON, CRANWORTH, STORY, and KENT, and which the highest courts in our country have declared to be founded on immutable truth and justice, and to stand upon our great moral obligation to refrain from placing ourselves in relations which excite a conflict between self-interest and integrity."

The case under consideration affords a fine illustration of the danger of permitting a conflict between self-interest and integrity. It is alleged in the complaint that when the proposals were received and contracts made, it was announced by the directors and understood by the bidders, that the contractors would be required to remove the earth from the gravel, and that after one of the directors had become a contractor, and others pecuniarily interested in the other contract, the board of directors passed an order imposing upon the company the labor and expense of removing such earth, thus increasing the costs of construction to the stockholders some sixteen hundred dollars, which went into the pockets of the contractors. The court committed no error in overruling the demurrer to the complaint.

The defendants answered in three paragraphs: first, the general denial. The second paragraph contains a long and

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minute history of the organization of the company, the articles of association, election of officers, the surveys and estimates, the making of the contracts for the building of the road, the assessments on the property of the stockholders, and a specific denial of each and all the allegations in the complaint, and especially the allegations of fraud and corruption. The historical portion of this paragraph does not differ essentially from that given in the complaint, and the residue does not amount to more than a specific and argumentative denial of the allegations of the complaint.

From a careful examination of this paragraph we have been unable to find any allegation of a fact that could not have been proved under the denial. It should have been stricken out on motion, but the judgment should not be reversed because a demurrer was sustained to it, as it resulted in no injury to the appellants.

The third paragraph alleges, that on the 27th day of July, 1869, the board of directors of the said company passed an order that the said road should be built of gravel, eight feet wide, twelve inches thick in the center, and six inches at the sides, and that the company should strip the earth from the gravel; that notice was given that lettings would be had thereon; that due notice was given of such lettings, and bids were received and contracts awarded according to the said order of the said board of directors; and that the road was being constructed under and in pursuance of the said order adopted on the said 27th day of July, 1869.

The contracts were made on the 12th day of August, 1869. The complaint alleges that the order changing the width and depth of the road, and requiring the company to remove the earth from the gravel, was made and adopted after the letting and awarding of contracts; and that the bids were made and contracts awarded with the understanding that the road was to be sixteen feet wide, and the gravel was to be eighteen inches in the center, and gradually slope to nine inches at the sides.

It will certainly require no argument or reference to

authorities to demonstrate that the matters and things alleged in the third paragraph of the answer only amounted to an argumentative denial of the allegations of the complaint. All the facts stated in this paragraph could have been proved under the general denial, and the evidence not being in the record, we will presume that the testimony was offered and received under the issue formed by the allegations of the complaint and general denial thereto.

The court committed no error in sustaining the demurrer to the third paragraph of the answer.

The judgment is affirmed, with costs.

B. F. Claypool, for appellants.

J. C. McIntosh, for appellees.

RUSH and Others v. MEGEE and Others.

WILL.—Unsound Mind.—Where a will was contested on the ground that the testator was of unsound mind, and the answer was the general denial;

Held, that every man is presumed to be sane or of sound mind, until the contrary is made to appear by evidence.

Held, also, that when it is shown by evidence that a man has been at one time insane or of unsound mind, the law presumes that he remains so, until it is shown by evidence that he has been either wholly or temporarily restored to sanity or soundness of mind.

SAME.—Husband and Wife.—Witness.—A person who was a plaintiff and also the husband of one of the plaintiffs contesting a will was properly excluded as a witness (PETTIT, J., dissenting).

SAME.—Evidence.—Where, on the trial of an action to contest a will, it had been shown that the testator, many years before the making of the will, had mysteriously left his home and gone to Kentucky and remained some time, and while there had shot himself, one of the plaintiffs, a daughter of the testator, was asked, while under examination as a witness for the plaintiffs, "What was said, if anything, to the defendants, or the family in the presence of the defendants, in relation to the absence of your father at the time he was in Kentucky?"

Held, that the question was too loose and broad to be permitted.

SAME.—Cross Examination.—Where a witness had testified to facts and circumstances strongly tending to show that the testator was insane before the execution of the will, and about the time the witness made a proposition to purchase

36	69
127	75
36	69
135	146
36	69
144	489
36	69
154	126
36	69
166	30

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land from him, the following question was asked the witness on cross examination: "If your proposition to purchase the land adjoining you from the testator had been accepted by him, would you have taken a conveyance from him?"

Held, that this was within the reasonable limits of a cross examination.

SAME.—*Expert*.—A physician, an expert, was asked this question: "If at any time or times before the making of his will, the testator was the subject of a delusion on the subject of poisons, and that delusion had relation to any of his sons-in-law, then, judging from the evidence of his acts and language on that day, and from all the evidence in the case, what was his condition at the time of making his will?"

Held, that the question was not a proper one to be answered by the witness; as an expert is not to judge of the credit of the witnesses or truth of facts testified to.

SAME.—*Rebutting*.—This question was asked an expert in rebutting evidence: "State whether the evidence introduced by the defendants, in connection with the evidence introduced by the plaintiffs, indicates to you that there was a lucid interval or not at the time the testator made his will."

Held, that the question was improper for the same reason as the last one."

SAME.—A witness for the defendants, an expert, having given his opinion from all the facts, in favor of the soundness of mind of the testator, was asked on cross examination this question, warranted by the evidence: "Suppose a man start suddenly from his tea table, under an impression that some one is at his door, when there has been no sound, and the door is closed, seize his gun, making out, and afterwards assert that he chased from his door a very near relative of the family, who lived close by, and that he finally disappeared from him in a cornfield; supposing him to be honest in his belief, and that no one was in fact at his door, what do you think of his mental condition?"

Held, that the question was admissible on cross examination.

SAME.—*Witness*.—*Opinion*.—A witness who had testified that he had known the testator intimately for many years; that he had officiated at the marriages of all the testator's children but one; that he knew him in church and had been with him many times, was asked the following questions: "What impression did the facts stated by you make upon you as to the soundness of the testator's mind?" Answer. "From the facts which I have detailed there was no impression made on my mind as to the testator's sanity." Second. "From the facts stated by you, what is your opinion as to the soundness of the testator's mind?" There was no answer to this question in the record. Third. "At the time of your intercourse with the testator, what was your opinion of the soundness of his mind, judging from the facts you have stated to the jury?" "Answer. "I had formed no other opinion than that he was a man of sound mind."

Held, that the questions were all proper.

APPEAL from the Rush Common Pleas.

PETTIT, J.—This suit was brought to contest the will of John Megee, deceased. A trial by jury was had, which re-

sulted in a verdict for the defendants below, who are appellees here. Motion for a new trial was overruled, exceptions properly taken, judgment on the verdict, and appeal to this court.

The complaint charges that at the time of the execution of the will the testator was of unsound mind; that the will was unduly executed by reason of duress and fraud; and issue was formed by the general denial. There are, in form, fourteen errors assigned, but in fact there is but one assigned error, the thirteenth in number, which is that the court erred in overruling the appellant's motion for a new trial. The twelve preceding assignments are only causes why a new trial should have been given, and are proper to be considered under the assignment of error for refusing to grant a new trial. The fourteenth is that the court erred in rendering judgment on the verdict for the appellees. This is not properly assignable as error; for after the motion for a new trial was overruled, it was, as a matter of course, the duty of the court to render judgment on the verdict.

We lay down these rules of law: first, every man is presumed to be sane or of sound mind until the contrary is made to appear by evidence; second, when it is shown by evidence that a man has been at one time insane or of unsound mind, the law presumes that he remains so, until it is shown by evidence that he has been, either wholly or temporarily (called a lucid interval), restored to sanity or soundness of mind. It follows, that if the appellants had proved that the testator had been of unsound mind at any time before making his will, it then devolved upon the appellees to show that he had been wholly restored, or that at the time of making the will he had a lucid interval.

The evidence is very voluminous, covering about two hundred pages, and cannot be set out at length here, nor successfully abbreviated in this opinion. This is not attempted to be done in the abstract or brief; but we have carefully read it, and on the part of the plaintiffs below (appellants here) it very strongly tends to prove that the testator had

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been insane or of unsound mind for and during many years previous to making the will. The evidence is so strong on this question that it would, un rebutted, fully justify the jury in finding that he was of unsound mind. The evidence of the defendants was mostly directed to show that he had been somewhat successful as a farmer; that he took interest in public matters, political and others; and that at the time of making the will he was sane, or at least that he had at that time a lucid interval. There is nothing in the will itself to show that the testator was of unsound mind, unless it is to be found in the great inequality in the disposition of his property among his children, which would seem to be unnatural and unreasonable, without some good cause or reason assigned for it.

The first question urged for which a new trial should have been granted is, that the court refused to allow Thomas N. Linck, one of the plaintiffs, and husband of Manetta Linck, also one of the plaintiffs, and daughter of the testator, to testify as a witness. Our law allows all parties to a suit like this to testify, except that husband and wife shall not testify for or against each other. A majority of the court hold that Linck was properly excluded as a witness, PETTIT, J., dissenting.

The second reason for a new trial is, that on the cross examination of one Lakin, a witness for the plaintiffs, the defendants having procured the witness to say that he had tried to buy a piece of land from the testator, asked him this question, which was allowed to be answered over the objections of the appellants: "If your proposition to purchase the land adjoining you from the testator had been accepted by him, would you have taken a conveyance from him?"

The witness had testified to facts and circumstances strongly tending to show that the testator was insane before the execution of the will, and about the time the proposition was made to purchase lands of him. We do not think this question was beyond the reasonable limits allowed in a cross examination, for it was calculated to test or try the intelli-

gence or honesty of the witness ; but, however this may be, it did not do the appellants any injury, for the answer was more favorable to them than to the appellees.

It had been shown by the evidence, that many years before the making of the will, the testator, then residing in Rush county, Indiana, had mysteriously left his home without the knowledge of his family, and had been gone some time. While Mrs. Margaret Rush, one of the plaintiffs, and daughter of the testator, was on the stand as a witness for the plaintiffs, she was asked: "What was said, if anything, to the defendants, or the family in the presence of the defendants, in relation to the absence of your father at the time he was in Kentucky?"

The evidence shows that the testator in this absence had gone to Kentucky, and, among other wild and irrational acts, had shot himself; but we think this question was too loose and broad to be asked, and that the court committed no error in refusing it.

The court permitted the appellees, over the objection of the appellants, to ask Dr. Athon, an expert, this question: "If, at any time or times, before the making of his will, John Megee was the subject of a delusion on the subject of poisons, and that delusion had relation to any of his sons-in-law, then, judging from the evidence of his acts and language on that day, and from all the evidence in the case, what was his condition at the time of making his will?" Some of the witnesses had testified to facts and circumstances tending to show, and had given their opinions, that the testator was of unsound mind; while others had testified to facts and circumstances, and given their opinions, that he was of sound mind. We are not enamored with expert testimony, however procured or presented. The best discussion of and collection of authorities on this subject we have ever seen is published in the January and April numbers of the Law Review for 1871. The article took the first prize at the Harvard Law School, May 1, 1870. We quote from it: "Lord DENMAN said: 'It may be that medical men may be

more in the habit of observing cases of this kind than other persons, and there may be cases in which medical testimony may be essential, but I cannot agree that moral insanity can be better judged of by medical men than by others.' *Reg. v. Oxford*, 9 C. & P. 525, 547.

"‘Experience,’ said Mr. Justice GRIER, ‘has shown that opposite opinions of persons professing to be experts may be obtained to any amount, and it often happens that not only many days, but even weeks, are consumed in cross examinations to test the skill or knowledge of the witnesses and the correctness of their opinions, wasting the time of the court and wearying its patience, and perplexing instead of elucidating the question involved in the issue.’ *Winans v. N. Y. & Erie R. R.*, 21 How. 88, 100.

“Chief Justice CHAPMAN said, in a late case in Massachusetts: ‘I think the opinions of experts are not so highly regarded now as they formerly were; for while they often afford great aid in the determination of facts, it often happens that experts can be found to testify to any theory, however absurd.’ Trial of Samuel M. Andrews, p. 256.

“Lord CAMPBELL said, in the case of the *Tracy Peckage*, 10 C. & F. 154, 191: ‘I do not mean to throw any reflection on Sir Frederick Madden. I dare say he is a very respectable gentleman, and did not mean to give any evidence that was untrue; but really this confirms the opinion I have entertained, that hardly any weight is to be given to the evidence of what are called scientific witnesses. They come with a bias on their minds to support the cause in which they are embarked.’

“Judge McLEAN also bears witness to the remarkable conflict that is generally displayed in the examination of scientific witnesses: ‘The opinions of the experts who have been examined are in conflict; and so far as my experience goes, this has been uniformly the case where experts have been examined.’ *Allen v. Hunter*, 6 McLean, 303. In this case, eight doctors deposed in favor of the plaintiff, and eleven in favor of the defendant. In the famous Freeman

trial, nine physicians and experts in insanity deposed one way, and seven quite as positively the other. In the Andrews trial, Dr. Jarvis swore positively to his belief that the prisoner was afflicted, at the time of the killing, with momentary insanity, maniac paroxysm, or *mania transitoria*; while Dr. Choate swore as distinctly the other way, on the ground that there was no such disease known to science.

"In England, the expert is not allowed to give his opinion upon all the evidence; but certain facts and particulars in evidence may be stated to him, and he is to say what they indicate, upon the supposition that they are true. *Reg. v. Frances*, 4 Cox. Cr. C. 57; *Doe v. Bainbrigge*, *id.* 454.

"In the case of M'Naghten, tried in 1843 for the murder of Mr. Drummond, an expert who had heard all the evidence was asked his opinion of the prisoner's state of mind in this form: 'Judging from the evidence which you have heard, what is your opinion as to the prisoner's state of mind?' Out of this case, several questions arose which were proposed in an abstract form by the House of Lords to the judges of England. One of these questions was this: 'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time he was doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?' Mr. Justice MAULE thought the question could be asked, according to the authorities and the prevailing usage, though it would be open to the objection, that as the 'opinion of the witness is founded upon those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as make it irrelevant to the inquiry.' All the other judges replied as follows: 'We think the medical man,

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under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which is for the jury to decide; and the questions are not mere questions upon matters of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes absolutely one of science only, it may be convenient to allow the questions to be put in that form, though the same cannot be insisted upon as matter of right.' *M'Naghten's Case*, 10 C. & F. 200; 67 Hansard, 288, 714.

"In the trial of Earl Ferrers, 19 Howell St. Tr. 943, the question there objected to was thus expressed: 'Please inform their lordships whether any and which of the circumstances which have been proved by the witnesses are symptoms of insanity.' Earl Hardwicke said, 'This question is general, tending to ask the doctor's opinion upon the result of the evidence, and is rightly objected to. If the noble lord will divide the question and ask whether this or that particular fact is a symptom of lunacy, I dare say there will be no objection.'

"In the discussion in the House of Lords on the *M'Naghten* case, Lord Brougham thus declared his view of the extent of the testimony to be derived from medical witnesses in cases of insanity: 'You shall ask them if such a fact is an indication of insanity, or not; you shall ask them, upon their experience, what is an indication of insanity; you shall draw from them what amount of symptoms constitute insanity; but you must not ask a witness whether the facts sworn to by other witnesses preceding him amount to a proof of insanity.' 67 Hansard, 614; Ray's Med. Juris. of Insanity, 574.

"It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts. *United States v. McGlue*, 1 Curtis C. C. 1. Experts are not to judge of the credit of the witnesses, or of the truth of the facts testi-

fied to by others. *Com. v. Rogers*, 7 Met. 500; *Fairchild v. Bascomb*, 35 Vt. 398."

Many other cases and authorities are cited in the Law Review above referred to, which are worthy of the careful attention of the student and the practicing lawyer, but we deem it unnecessary to further copy from or cite them.

We hold that the court erred in allowing the question as put to be asked of, or answered by, Dr. Athon. 1 Greenleaf's Ev. 440; *The People v. Lake*, 12 N. Y. 358.

It is insisted that the court erred in not allowing the appellants to ask Dr. Marshall Sexton, in rebutting, the following question: "State whether the evidence introduced by the defendants, in connection with the evidence introduced by the plaintiffs, indicates to you that there was a lucid interval or not, at the time John Megee made his will."

This question was properly refused by the court, upon the authorities cited above, as to the question asked Dr. Athon.

It is insisted that it was error in the court to refuse the appellants to ask Dr. Athon (a witness for the appellees), on cross examination, this question: "Suppose a man to start suddenly from his tea table under an impression that some one is at his door, when there has been no sound, and the door is closed; he seizes his gun, makes out, and afterward asserts that he chased from his door a very near relative of the family, who lived close by, and that he finally disappeared from him in the cornfield. Supposing him to be honest in his belief, and that no one was in fact at his door, what do you think of his mental condition?" Evidence had been given strongly tending to prove the state of facts set out and contemplated in the question. This question was clearly admissible on cross examination, as the doctor had stated that from all the evidence he judged the testator was of sound mind; and it was strictly an hypothetical state of facts fully warranted by the evidence and the court erred in refusing it to be asked.

The court allowed the appellees to ask Dr. Athon the following question, which was objected to by the appellants:

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"Is not rational conduct and coherent conversation the best evidence of the existence of a lucid interval, especially if such conduct and conversation relates to the subject of the delusion?" It was error to allow this question to be asked, as it was propounded. The doctor should not be asked what is the best evidence of sanity or of insanity, but whether a given state of facts tends to prove the one or the other condition. See the authorities above cited.

The question or objection as to the offered evidence of Drs. Sexton, Moffitt, Pugh, and Hobbs, need not be noticed, as the opinion above covers all the questions offered to be proved by them.

After D. M. Stewart had testified as a witness for appellees, that he had known the testator intimately from 1836 till his death; that he had officiated at the marriage of all of testator's children but one; that he knew him in church, and had been with him many times, etc., he was asked by appellees the following questions:

1st. What impression did the facts stated by you make upon you, as to the soundness of John Megee's mind? Answer. From the facts which I have detailed there was no impression made on my mind as to the testator's sanity.

2d. From the facts stated by you, what is your opinion as to the soundness of John Megee's mind? There was no answer to this question in the transcript.

3d. At the time of your intercourse with John Megee, what was your opinion of the soundness of his mind, judging from the facts you have stated to the jury? Answer. I had formed no other opinion than that he was a man of sound mind. It is insisted that it was error to allow these questions to be asked over the objection of the appellants.

There had been a strong effort made to prove that the testator had been of unsound mind, running through many years of the witnesses' acquaintance with him; and we can see no valid objection to the questions. It is well settled that any witness, in a contest like this, may give his opinions or impressions formed by acquaintance and conversations

with, and actions of, the person sought to be proved insane, as to his mental condition. This doctrine will be found in many of the cases above cited. See also, *Choice v. The State of Georgia*, 31 Ga. 424, 466.

It is insisted that the instructions, as a whole, and in detail, are erroneous. They are as follows:

"This suit is brought to contest the validity of the will of John Megee, deceased. The plaintiffs charge in their complaint, that at the time the instrument in question was executed, John Megee, the testator, was a person of unsound mind. This is denied by the defendants. The question, therefore, to be determined by your verdict in the case, is whether he was of unsound mind at the time that instrument was executed by him. The law authorizes a person of sound mind to make such disposition, by will, of his property as he chooses, no matter how inequitable or unjust that disposition may appear to others; for such want of equity his will cannot be impeached or set aside. It presumes that the party making the will was a person of sound mind, and casts upon whoever would impeach it the burthen of proving the unsoundness necessary to invalidate it. This instrument must therefore stand as the last will and testament of John Megee, deceased, until the plaintiffs have furnished evidence satisfactory to your minds, that at the time he executed it he was a person of unsound mind.

"When you retire to deliberate of your verdict, you will, therefore, be required to address yourselves to this inquiry: Has it been proven in this case, by the plaintiffs, that the testator was, at the time this instrument was executed, a person of unsound mind? The question is at once presented, who is a person of unsound mind? In legal contemplation, one who has sufficient mind to know and understand the business in which he is engaged, who has sufficient mental capacity to enable him to know the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty, and who could keep these in his mind long enough to, and could, form a rational judgment in relation

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to them, is a person of sound mind. If he has not mental capacity to this extent, he would be a person of unsound mind, incapable of making a will. If he has mental capacity to this extent, he could make a will. Mental unsoundness may be general, it may extend to all of a man's faculties; or it may be partial, influencing or affecting only a part of his mental faculties. If his insanity or unsoundness of mind is general, extending to all his faculties, he could not make a will. If it is only partial, it may or may not invalidate his will.

"If the evidence shows such a want of mental capacity, such general mental derangement as prevents the party from comprehending the business he has in hand, he could not make a will. But although there may not be shown such general derangement of the faculties or want of capacity, still it is necessary that his mind should be in such a condition that he could form a rational judgment in relation to the business he was transacting. If he was acting under the influence of a delusion which distorted his judgment in relation to those who would be supposed to be the objects of his bounty, which prevented him from arriving at rational conclusions in regard to them, he would not be competent to make a will. A delusion exists where a person, against all evidence and probability, persists in believing as facts, matters that have no existence except in his own perverted imagination. The man whose mind is thus preyed upon, is to that extent insane; and if such delusion enters into and influences the disposition of his property by will, his will would be void for the want of testamentary capacity; or in other words, because he was not a person of sound mind. Upon the other hand, if he understood the extent of his estate and objects of his bounty, and no such delusion existed, or if it did exist, but did not influence or affect his judgment in disposing of his estate by his will, such will would be sustained. It is, therefore, highly essential that you should determine, from the evidence, whether or not such a delusion existed in his mind at the time this will was made. The entire inquiry in this case is to be directed to

the time of the execution of this will; that is, to the time when the testator signed this instrument in controversy and caused it to be witnessed; for if a delusion had formerly existed which rendered him wholly or partially insane, but it had disappeared from his mind at the time the will was executed, it could not influence this case. But while the existence of the delusion at the time of the execution of the will must be proven, it is not necessary that it should be proven by evidence directed to that precise time. You have the right, and it is your duty to consider the whole of the evidence before you on that subject; all facts and circumstances, and the conduct and declarations of the testator, before and after, as well as at the time of the execution of the instrument. If it is proven that the delusion existed at the time this instrument was executed, you must further inquire whether or not it influenced his mind in relation to those who were properly the objects of his bounty. For these objects you would not look outside of his own family—his wife and children and the descendants of such children as might be dead. If his mind was so affected by delusions, and those delusions influenced and warped his judgment in relation to any of those, this instrument could not stand as his will. But although the delusions may have existed in his mind at the time the instrument was executed, still, if they did not influence his judgment in relation to these objects of his bounty, his will would not be affected by their existence. To come plainly to this question, and direct your minds squarely to it, I mean this: If he was afflicted with delusions which related to his sons-in-law, Dr. Rush and Mr. Link, entertained at the time of the execution of this instrument, the belief that they designed to poison him and persisted in that belief without reason, and against all evidence or probability, and if such delusion affected his judgment in disposing of his property among the members of his family just alluded to, such disposition could not be maintained. But if, notwithstanding he entertained such

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delusions in regard to Dr. Rush and Mr. Link, he did not permit them to affect his judgment as to the members of his family, and his mind was not influenced by them, his will would be valid. The same principle is applicable to any delusion entertained in regard to any person.

"In examining this case, then, so far as this question is concerned, you inquire, first, whether delusions existed in the mind of the testator. Second. Whether they were present in his mind at the time of making the will. These are essential to be proven in order to constitute or show that partial insanity which would warrant you in setting aside his will. You are to ask yourselves the question, whether he was the victim of delusion or delusions, and you are to carefully examine the evidence and see whether that which was operating upon his mind was a delusion or only a suspicion, or perverse opinion, or unreasonable prejudice, or mere eccentricity. It may be any of these, and still no delusion. If there was no delusion, but only perversity, or prejudice, or eccentricities of character, or suspicion, there would be no partial insanity. If, then, there was anything out of the way in regard to his mind, what was it? Your duty requires you, as it were, to look into his mind and see whether it is disordered by delusions or only wrought upon by its suspicions, or prejudices, or eccentricities. In doing this, the evidence is the light by which you must be guarded. All that he has said, and all that he has done, may properly be considered. If he consulted others upon the subject; if he took medical opinions upon the subject of poisons, or made statements of what he supposed to be facts in relation to the administration of poisons to him, or the application of it to his person, these, and any such as these, proved by the evidence, would be circumstances proper for your consideration in determining whether there was delusion in his mind or not. If such delusion ever did exist, was it in existence or had it been removed at the time the will was made? is an equally important subject of your inquiry. If it had once existed, but had ceased to be present in the

mind, it could not affect this will. And here, too, you have the right, and it is your duty to look carefully to the evidence furnished by his sayings and doings; his subsequent familiarity with the suspected persons; his trading or dealing with them, or either of them, especially in articles similar to that which he suspected to have been used in the administration of poison to him; social intercourse with them on his part. Any such facts proved by the evidence would be proper for your consideration in determining whether such delusion still existed in, or had passed away from, his mind. If there was none such in his mind, there was no such partial insanity as would invalidate his will. But if there was, it is equally important to consider whether his judgment was affected by it. The opinions he had formerly entertained as to his family, and the disposition of his property; his treatment of those against whom these delusions would be supposed to influence him, both before and after his will was executed; his conduct at the time of the execution of his will; the reasons he gave for the manner of disposing of his property; the provisions of the will itself; the amount of property he had; the circumstances of the various members of his family; his knowledge of such circumstances; every fact and circumstance, indeed, proved by the evidence is properly for your consideration in settling this question.

“Upon a careful examination of the evidence and every part of it appertaining to this matter, if it satisfies you that his mind was preyed upon by delusion, which warped his judgment in relation to those who were properly the objects of his bounty, or any of them, the instrument is not his will. If he was not the victim of delusion, or if he was, and his judgment as to such persons was not affected by it, it is his will. To enable you properly to determine the question whether there was general or partial derangement of the mind, you have brought to your aid, naturally, his own conduct, actions, language, the situation of his family, the extent and character of his estate, and also the opinions of per-

sons based upon their knowledge of him, and the opinions of persons supposed to be skilled in the science of the mind. Of the weight proper to be given to every part of this evidence, you are to be the judges. The opinions of those not skilled in the science of the mind should be judged of by the facts upon which they are predicated.

“The opinion of a witness, whose attention has been particularly called to the testator, who was familiarly acquainted with him, who had frequent opportunities of observing him, and the operations of his mind, is entitled to greater weight than that of a witness of equal sagacity whose opportunities of forming an opinion were more limited. The facts upon which the opinions of such witnesses are based have been given you, and you should weigh the opinion expressed by the facts given. The opinions of subscribing witnesses to the will should also be considered. The opinions of medical men, scientific men, commonly called experts, are also to be weighed by you. You are to determine the weight properly to be attached to the opinions of such witnesses. You are to consider their experience, the extent of their study and practice in relation to such matters, the reasonableness or unreasonableness of the opinions they have expressed, and whatever of interest they may have or manifest in regard to the case. You should consider also whether the testimony of such witnesses is partisan in its character, warped or biased by any leanings for or against any of the parties. You should consider the circumstances under which they testify; and, in short, you should scan all the evidence closely, to the end that you may give to every part of it its proper weight, neither less nor more. You are not bound to receive the opinion of any witness as conclusive in this case, nor should you exclude the opinion or testimony of any, without substantial reasons for so doing. As I have already said to you, a person of sound mind may make just such a will as he pleases, and the motives that actuated him cannot be inquired into, but when the instrument is attacked for want of mental capacity on the part of the testator, it is

proper for the jury to consider the will itself, and the disposition made of his property by the testator therein as bearing upon the question of his sanity. In this case, therefore, you can consider this will; the extent of his property; whatever he may have said at other times, as to how he intended to dispose of it; the conditions and circumstances of his family, and each and every member thereof, and every circumstance of his conduct; his feelings, and declarations, and sentiments respecting his property and family, before, after, and especially at the time of the execution of that instrument. Examining, and weighing, and giving due consideration to every part of this evidence, you are to say whether or not there was either general derangement of his mind, or partial insanity. If it has been made to appear that his mind was unsound, either generally deranged or partially insane before the will was made, the burden of proving which is upon the plaintiffs, then the law presumes that insanity to continue until it is proven that the insanity no longer exists. That presumption would not exist when insanity of only temporary character is proved. But if insanity not temporary in its character is proved, then the burthen of proving that the insanity had ceased to exist is upon the defendants. You are to consider, therefore, if insanity, general or partial, and not temporary in its character, has been proved, whether or not it has been proved that a lucid interval existed at the time the will was executed. As I have said, the burthen of proving this is upon the defendants, and it behooves you to look closely to the testimony bearing upon the time when this instrument was executed, that is, the time when the instrument was signed by the testator and acknowledged to be his will. The great question is, what was his condition then? And you should scrutinize with all the care you can, what occurred on that day, in connection with the other evidence, to enable you to correctly understand the condition of his mind on that day.

"If insanity has been proven before the time of the execution of the will, you would therefore be authorized to infer

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that he was of unsound mind when the will was executed, unless the evidence satisfies you that the insanity had at that time ceased to exist. If the evidence does not so satisfy you, you would be authorized to find this will invalid. But if the evidence satisfies you that although there may have been insanity before, there was none at that time, you should sustain the will by your verdict; upon this branch of this case, then, I close what I have to say to you upon this subject, by repeating to you what I said in the beginning, that if he had sufficient mind at the time he made the will, to understand the business he was engaged in, to understand the extent of his property, the persons who were supposed to be the objects of his bounty, and could hold these in his mind long enough to, and could, form a rational judgment in regard to them, he was a person, in contemplation of law, of sound mind. If he had not mental capacity to that extent, he would not be a person of sound mind, but of unsound mind; in legal contemplation. Your verdict would be for the plaintiffs, if he had not this extent of capacity; for the defendants, if he had this extent of capacity.

"You cannot be too careful in your investigations in this case. It is one of unusually great importance. It demands of you a cautious, thorough examination of all the evidence, to the end that your verdict shall be strictly in accordance with the law and the evidence."

We have given to these instructions repeated, careful, and thorough examinations, and we fully indorse them as in all respects fully applicable and warranted by the evidence in and circumstances of the case. They show great learning, research, and care.

The judgment is reversed, at the costs of the appellees, and the cause is remanded for further proceedings not inconsistent with this opinion.*

B. F. Claypool, D. W. Voorhees, and W. A. Cullen, for appellants.

L. Sexton, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellees.

*Petition for rehearing overruled.

THE BOARD OF COMMISSIONERS OF BLACKFORD COUNTY v.
SHRADER.

TOWN.—*Street Improvements.—County Commissioners.—Appeal.*—The contractor for the improvement of a street bordering on a public square in a town, upon receiving an estimate for work done, may present his claim therefor in the form of an account against the county, to the board of commissioners, who have the power to allow it; and if payment is refused, he may either appeal from the action of the board to the circuit court, or bring an action against the county.

SAME.—*Pleading.—Evidence.*—It is not necessary that the account so presented should state that all the steps required by law to make a valid assessment were taken, but evidence thereof can be introduced on the trial on appeal.

SAME.—*Lowest Bidder.—Evidence.*—The evidence, in such trial on appeal, is not insufficient, merely because it does not show the contract to have been given to the lowest bidder.

SAME.—*Construction of Statute.—Question of Fact.*—Who is the lowest bidder, is a question of fact arising prior to the making of the contract, and, under the statute, cannot be inquired into on the trial of the action for work done.

SAME.—*Trustees of Town.—Petition.—Public Square.*—To render a county liable for the improvement of a street around a public square, made by order of the board of trustees of a town, it is not necessary that a petition for such improvement be filed.

APPEAL from the Blackford Circuit Court.

DOWNEY, C. J.—The trustees of the town of Hartford City made an order for the improvement of the streets around the public square in that town; after advertising, the work was let to Shrader; the sum of fifty dollars and eighty cents being due him as an estimate for work done, he presented his claim therefor to the Board of Commissioners, which being disallowed, he appealed to the circuit court, where his claim was allowed and judgment therefor rendered, from which judgment the commissioners appealed to this court.

Several errors are assigned, but the third and fourth cover all the questions discussed in the briefs. These alleged errors are: third, that the cause of action does not state facts sufficient; and fourth, the refusal of the circuit court to grant a new trial.

It is provided in the act of April 27th, 1869, special session 1869, p. 33, section 1, that the board of trustees of towns

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shall have exclusive power over the streets, alleys, highways, etc., within the town, etc. Section 8, p. 35, authorizes the trustees, on petition of a majority of all the resident owners of any lots or parcels of land, to cause the streets or alleys to be graded, paved, gravelled, etc. It further provides, "that the said board of trustees may order the improvement as aforesaid of any street around the public square in such town without the filing of such petition, and when the county in which such town is situated owns or controls real estate bordering on such public square, it shall be subject to the same rules and regulations as to payment for said improvements as the citizens of said town."

Section 10, p. 36, provides for the making of estimates from time to time of the work done, makes the same a lien on the property, and gives the contractor an action therefor if not paid, by suit in any court of competent jurisdiction. It also provides that in such suits no question of fact shall be tried which may arise prior to the making of the contract, etc.

The contractor, thus having a claim against the county, was authorized to present it to the county commissioners for allowance, and they had the power to allow it. 1 G. & H. 249, sec. 13. If the claim was disallowed, he had his choice to appeal or bring an action against the county. 1 G. & H. 65, sec. 10. This appeal might be to the circuit or common pleas court. 1 G. & H. 253, sec. 31.

The claim presented to the commissioners was as follows:

"BLACKFORD COUNTY, INDIANA.

To Wm. M. Shrader

Dr.

Sept. 8th, 1869. To gravelling street bordering on public square, as per estimate of August 23d, 1869, beginning thirty-seven and one-quarter feet from south-east corner of fence around the public square, thence west two hundred and fifty-four feet, thence south seven and one-half feet, thence east two hundred and fifty-four feet, thence north seven and one-half feet, to the place of beginning, at twenty cents per lineal foot, fifty dollars and eighty cents."

We think this claim was sufficient. It was not necessary to allege in it all the steps which the law required to be taken to render the county liable. Under the allegation that the county was indebted to him, we think the claimant might introduce evidence of the facts necessary to show the liability. See *The Board of Commissioners of Fountain County v. Wood*, 35 Ind. 70.

It is urged by counsel for the appellant that the case turns upon the construction to be given to that part of section 8 which speaks of "real estate bordering on such public square." We do not think so. The board of trustees is expressly authorized to order the improvement of any street around the public square without the filing of any petition; and the cost of this improvement, so far as chargeable to the county, we think, is to be charged against the public square. The real estate bordering on such public square, referred to in section 8, is real estate other than the public square, which the county owns or controls, and which also is made "subject to the same rules," etc.

But it is urged, secondly, that the evidence was insufficient, because it did not show that Shrader was the lowest bidder for the contract. We think there are two sufficient answers to this objection: 1. That the trustees were not bound to accept the lowest bid. The lowest bidder may not be responsible, or competent, or perhaps there may be other reasons for not awarding to him the contract. 2. The law under which the improvement was made, as we have seen, provides that no question of fact shall be tried which may arise prior to the making of the contract, etc. The determination of the question as to who is the lowest and best bidder precedes the making of the contract, and cannot, therefore, be inquired into in an action to recover for the work done. The reason for this provision is very evident. *Hellenkamp v. The City of Lafayette*, 30 Ind. 192. Whether the rule is of general application or not, we think that in this case "the laborer is worthy of his hire."

The judgment below is affirmed, with ten per cent. damages and costs.

I. Van Devanter and *J. F. McDowell*, for appellant.

A. B. Jetmore and *W. A. Bonham*, for appellee.

THE CITY OF DELPHI v. EVANS.

88	90
194	88
36	90
165	270

STREET IMPROVEMENTS.—*Authority to Make.—Consequential Damages.*—

The authorities of towns and cities have ample power to lay out, open, grade, regrade, level, and pave or gravel streets and alleys, and to establish drains and sewers, culverts, and embankments, whenever they are necessary for the improvement of such streets and alleys; and where the work is done with proper care and skill and without malice, the town or city will not be liable for any consequential damages that may result therefrom.

SAME.—*City.—Appropriation of Real Estate.—Damages.*—Where the land of the citizen is not actually appropriated in the making of such improvements, the owner is not entitled to have the damages first assessed and tendered; but where it becomes necessary in making such improvements to appropriate and use the real estate of a citizen, his damages must be first assessed and tendered.

SAME.—*Proceedings Required.*—The improvement may be under an ordinance, a motion, or resolution, but whatever mode may be adopted, it must comply with the requirements of the charter. It must be in writing, and where there is a petition for the improvement, it must be passed by a vote of a majority of the council, or by a two-thirds vote where there is no petition. The order made must be entered of record, together with the vote on its passage, showing that it was adopted by the requisite vote, and this order must be followed by an advertisement for proposals to do the work, and there must be a written contract made and reported to, and approved by, the common council.

SAME.—*Power of Council to Establish Grade.*—The common council of a city has the right to establish the grade of a street, and may cause the same to be excavated at one point and filled at another, and the earth, gravel, or stone excavated at one point may be used in making a fill at another point in said street.

SAME.—*Improvement of more than one Street.*—Where the common council has taken the proper steps for the improvement of a particular street, it has no power to order the cutting down of another street, where no improvement is authorized, for the purpose of obtaining gravel or dirt to make the improvement contemplated. But where the council has established the grades of different streets and has ordered their improvement in conformity

to the grades established, the earth, gravel, and stone excavated on one street so ordered to be improved may be used in filling up a low place in another street where such improvement is authorized. In such case the excavation in the one street and the fill in the other are each for the improvement of the respective streets.

SAME.—Removal of Earth from Streets.—Liability of City for Damages.—A. being the owner of lots bounded by two streets, in a city organized under the general law for the incorporation of cities, the common council contracted with B. to make a fill of earth upon another street in said city not contiguous to said lots, and ordered and permitted the contractor to remove earth from a part of one of the streets along the line of said lots, to make such fill, such earth not being required or used for the improvement of the streets along which the lots were located, and the removal thereof greatly injuring said streets and damaging said lots. No order had been made or ordinance adopted by the common council for the improvement of the street to which the earth was taken, prior to the contract or the removal of the earth.

Held, that the owner of the lots could maintain an action against the city for the injury resulting to the lots from the removal of said earth.

APPEAL from the Carroll Common Pleas.

BUSKIRK, J.—The only error assigned and relied upon by the appellant is, that the court erred in overruling a demurrer to the complaint. The complaint was in two paragraphs. The second contained all that was in the first, and also some allegations that were not in the first paragraph.

The second paragraph was in these words: "And the plaintiff further says, that he is the owner and holds possession of lots numbered 4 and 5, in Wilson's addition to the said city of Delphi, and was such during the entire year of 1867; that said lots are bounded on the east by Wilson street, and on the south by Frank street; that Frank street terminates on the east at Wilson street; that some time in the year 1867 the mayor and common council of the city of Delphi, in the county aforesaid, contracted with Joseph Polk and John Harrison to make a fill of earth upon Washington street in said city, and ordered and permitted them to take the earth for that purpose from the east end of Frank street; that at the time, there was a regular descending grade from the south end of plaintiff's lots to about the middle of Frank street, south of which, in said Frank street, there was a level track into Wilson street; that the earth beneath said descent

was firm and solid, and was not affected by washing, rains, freezing, or thawing; that in accordance with said contract, said Polk and Harrison did, during the months of September, October, and November, 1867, cut, dig, and haul away a large quantity of earth therefrom, to wit, the entire width of plaintiff's lots, one hundred and twenty feet; also the alley on the west, twelve feet wide, and west thereof more than one hundred feet, cutting away a part of the sidewalk of said plaintiff, leaving a perpendicular bank at the ends of plaintiff's lots twelve feet deep, and on Wilson street five feet deep; that there were no commissioners appointed by said common council and duly qualified, whose duty it was to value the land and other property thus appropriated; that no notice was given plaintiff by said common council, or by any person for them, that they intended to appropriate said land, or to any person whatever; that no valuation of the same was made, nor injury or benefit assessed, and no report made of the same, as is required by the statute in such case made and provided; that the same was not done for the construction, repair, or benefit of Frank and Wilson streets, but was a great and material injury to the same, by reason of which, and on account of the condition of said banks, the earth, from rain, freezing, and thawing, has crumbled and fallen until it has greatly destroyed plaintiff's sidewalk, wrecked his fence, rendered traveling upon said street much more inconvenient, and done other and further damage to his said property, by means of which his said property has been reduced in value to a large amount, to wit, to the sum of five hundred dollars. He therefore demands judgment for one thousand dollars, and other proper relief.

It is alleged in the complaint that the appellee was the owner, and resided upon lots four and five in Wilson's addition to the city of Delphi; that such lots were bounded on the east by Wilson street, and on the south by Frank street; that the mayor and common council contracted with Joseph Polk and John Harrison to make a fill of earth upon Washington street, and had ordered and permitted such contrac-

tors to take earth from the east end of Frank street to make such fill; that the earth removed was not required or used for the improvement of Wilson or Frank streets, but greatly injured said streets and damaged the property of the plaintiff; that no order had been made, or ordinance adopted, by the common council for the making of improvements in Washington, Wilson, and Frank streets, or either of them, prior to the making of said contract with the said Polk and Harrison, and prior to the removal of the earth from the said street in front of the property of the plaintiff.

It is admitted by the learned counsel for the appellants, in their brief, that the judgment of the court below was correct, if the facts stated in the complaint constituted a good cause of action, but it is earnestly maintained that upon the facts stated, the city was not liable for any injury that may have resulted to the plaintiff from the removal of said earth. The position assumed by the appellant is, that the mayor and common council of said city possessed ample power and authority to lay out, open, grade, level, and pave the streets of such city, and that in so doing they had the right to appropriate and remove the earth from the street in front of the property of the plaintiff, to make the fill in Washington street; and that the city was not liable for any consequential damage that might result; and in support of this position reference is made to the following decisions of this court: *Snyder v. The President, etc.*, 6 Ind. 237; *Wood v. Mears*, 12 Ind. 515; *Macy v. The City of Indianapolis*, 17 Ind. 267; *The City of Indianapolis v. Imberry*, 17 Ind. 175; *The City of Lafayette v. Bush*, 19 Ind. 326; *The City of Vincennes v. Richards*, 23 Ind. 381.

The object of the suit in *Snyder v. The President, etc.*, *supra*, was to enjoin the authorities of the town of Rockport from extending a street from the top of the bank on the Ohio river down to the water in said river so as to make a wharf. It was alleged in the complaint that the town of Rockport is situated upon the bank of the Ohio river, seventy-five feet above the water; that the main street of said town, ninety-

five feet wide, extends from the river outward, descending somewhat as it extends; that the plaintiffs own the lots upon said street on the river bluff, and that the trustees of the town are about to have said main street graded, filling the end back from the river and cutting down the end upon the river, through the bluff of seventy-five feet, so as to open a communication, by said street, between the town and the river, and also furnish a landing for steamboats, etc., at its termination. The injunction was asked upon the grounds, that the proposed improvement would greatly injure the property of the complainants; that the corporation did not propose to pay, and was unable to pay the damages which would result to complainants; and that the project, if carried into effect, would be of no utility.

The trustees of said town had made an order for the making of such improvement, and there was no objection urged to the regularity of the proceedings. This court say: "As to compensation for the injury which the grading of the street may work to the property of the plaintiffs, they are entitled to none on general principles of law. This is well settled. If the trustees were proceeding in violation of law, and negligently and wantonly prosecuting the work to their detriment, the case would be different; but where a street is graded pursuant to legal authority, and in a careful manner, the adjoining owners of lots have no right to compensation for consequential damages to their lots, unless expressly given by statute; and in that case the compensation must be sought in the manner prescribed by the statute."

The case of *Wood v. Mears*, *supra*, is not in point. That was an action by Mears to recover from Wood damages for injuries done to his horse and buggy by driving over a pile of dirt that Wood had placed in the street. The defense of Wood was, that he was about to build a house on said street, and that he had placed the earth and gravel in the street to be used in such building. The court discusses with marked ability the correlative rights of the public in the streets of a

town or city, and of the owners of lots abutting on such streets.

We will examine the case of *The City of Indianapolis v. Imberry, supra*, in a subsequent part of this opinion.

The questions involved in the case of *Macy v. The City of Indianapolis, supra*, were these: first, can the common council of a city, after they have once established the grade of a street, and after adjoining lots have been improved in conformity to such grade, cause the street to be regraded? Second, if so, can they cause it to be done without first having the consequential damages, resulting from such change in the grade to adjoining proprietors, assessed and tendered to them? This court held, that the grade of a street in a city might be changed, and that the city was not liable for any consequential injury resulting to the adjoining proprietors.

The case of *The City of Lafayette v. Bush, supra*, was an action by the plaintiffs against the city, and those acting under her authority, to enjoin the city and certain contractors from using and appropriating certain lots of Mrs. Bush, to the purposes of a street, no compensation having been assessed and tendered. The court, after reaffirming the principles enunciated in the case of *Macy v. The City of Indianapolis, supra*, say: "Such, however, is not the case before us. Here the city is appropriating parts of the lots of Mrs. Bush to the purposes of a street, and digging and excavating them for that purpose. Provision is made for assessing and tendering damages in such cases, and the city cannot thus appropriate the property of the plaintiff without first complying with such provision."

In *The City of Vincennes v. Richards, supra*, the appellee sued the appellants, alleging that he owned and resided upon a certain half lot in the city of Vincennes; that the city, by erecting and maintaining divers culverts, embankments, ditches, water ways, grades, and excavations upon certain streets of the city, caused the waste water, which before had

been accustomed to flow elsewhere, to be diverted from its natural channels and thrown upon the appellee's lot.

The city answered, in substance, that such city was incorporated under the general laws of the State; that the common council had ordered the streets mentioned in the complaint to be graded and improved; that in pursuance of such order, it did erect and still maintains said culverts, etc.; that the work was done in a careful and proper manner, and, in the judgment of the common council, was necessary and proper; and that the damages, if any, were the necessary consequence of said improvements, and were not caused by any neglect or carelessness, etc.

The court held that the statute (1 G. & H. 231) gives the city full power to do what it is alleged to have done in the improvement of the streets. The court say: "It has full authority to repair the streets and construct drains and sewers. If it does this with proper skill and care, and without malice, as the paragraph alleges, in substance, and consequential injury results to the citizen, he has no remedy, and the fault, if any, is in the law, which we must declare as we find it to exist."

We are of the opinion that the foregoing authorities establish the following propositions:

1. That the authorities of towns and cities have ample power to lay out, open, grade, regrade, level, and pave or gravel streets and alleys; to establish drains and sewers, culverts and embankments, whenever they are necessary for the improvement of such streets and alleys; that where the work is done with proper care and skill and without malice, the town or city will not be liable to a citizen for any consequential damages that may result therefrom.

2. That where the land of the citizen is not actually appropriated in the making of such improvements, the owner is not entitled to have the damages first assessed and tendered; but where it becomes necessary, in the making of such improvements, to appropriate and use the real estate of a citizen, his damages must be first assessed and tendered.

But we do not regard the foregoing propositions as decisive of the case under consideration, for in all of the above cases an order had been passed by the municipal authorities for the making of such improvements; and it therefore remains for us to inquire and determine whether the mayor and common council of the city of Delphi possessed the power to make the contract with Polk and Harrison before the common council had ordered such improvement to be made.

So much of section 68 of the act of incorporation of cities as applies to the question under discussion reads as follows:

"Sec. 68. When the owners of two-thirds of the whole line of lots or parts of lots (and measuring only the front line of such lots as belong to persons resident in such city) bordering on any street or alley, consisting of one whole square between any two streets crossing the same, of [or] if the common council deem it expedient, for any reasonable distance upon any square or alley, less than one whole square or block, shall petition the common council to have the sidewalks graded and paved, or the whole width of the street graded and paved, or for either kind of improvement, or for lighting such street according to the general plan of such improvement in said city, the common council may cause the same to be done, by contracts given to the best bidder, after advertising to receive proposals therefor; and the common council shall have power to compel the owner or owners of a lot, or a part of a lot, on any street or alley, or upon any part of a street or alley, to repair the sidewalks in front of their respective lots or parts of lots; and in case the owner or owners of any lot or a part of a lot, or any street or alley or any part thereof, fail or refuse to repair the sidewalks in front of their lots, the common council may cause such repairs to be made by the street commissioner, at the cost and expense of the owner or owners of such lot or lots; and the city shall have a lien on such lot or lots for the reimbursement to her of the cost of such improvement.

and the common council are hereby invested with full powers to pass by-laws and ordinances providing how and in what manner the repairs shall be made, and in what manner the same shall be assessed and collected from such owner or owners, and the manner in which the lien of the city for the expense incurred by her may be enforced against the lot or lots of such owner or owners."

Section 71 of said act prescribes the manner in which assessments made for said street improvements shall be collected when the owners of lots refuse to pay. It provides for the issuing of a precept, from which an appeal may be taken to the common pleas court. The said section contains the following provision:

"The clerk shall, upon the filing of said bond, forthwith make out and certify, under his hand and official seal, a true and complete copy of all papers connected in any way with the said street improvement, beginning with the order of the council directing the work to be done and contracted for, and including all notices, precepts, orders of council, bonds, and other papers filed in said manner, which transcript shall be in the nature of a complaint, and to which the appellant shall answer upon rule, and in case the court and jury shall find upon trial that the proceedings of said officers subsequent to said order directing the work to be done are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon; then said court shall direct the said property to be sold and conveyed by the sheriff thereof, as the said treasurer is hereinafter directed to sell and convey property liable to street improvements."

It is very apparent, from the language used in sections 68 and 71, that there must be an order made directing the work to be done. After the order is made, there must be an advertisement for the proposals for doing the work, and after such advertisement, there must be a contract in writing for the doing of the work as ordered. But there can be no valid and legal contract made until an order has been made by

the common council, and there has been an advertisement for proposals for doing the work. Any contract that may be entered into, without such order having been made and advertisement published, would be illegal and void. The making of the order for the improvement is a judicial act, which may result in depriving citizens of their property, and should be made with due formality and entered of record. The decisions of this court, as to the form of the order, the manner of its adoption, and the necessity of its being entered of record, are not uniform and consistent, but all agree that there must be an order passed. It was held by this court in *The City of Indianapolis v. Imberry*, 17 Ind. 175, that it need not be by ordinance, but might be by motion or resolution, and that it need not be entered of record. The court say: "By the charter, the council has jurisdiction over the streets and alleys of the city, with power to provide for their improvement and repair. It has power to order them graded and gravelled or paved. It may do this, first, upon the petition of freeholders, according to section 66 of the charter, by a majority vote; second, by a two-thirds vote of the council, without a petition, according to section 68 of the charter. It does not appear, nor is it necessary that it should, in this case, whether there was a petition or not. The manner in which the order or determination of the council, that a given street or alley, or part thereof, shall be improved, is to be expressed, is not pointed out in the paramount law, but we think it need not be by ordinance. We think it may be expressed by motion or resolution."

In a subsequent part of the opinion it is intimated that the order might be proved by parol. There is no doubt that this might be done where the order had been made, entered of record, and destroyed.

It was said by this court, in *The City of Logansport v. Wright*, 25 Ind. 512, that "An ordinance of a city corporation directing the construction of a work, within the general scope of its powers, is a judicial act, for which the corpora-

The City of Delphi v. Evans.

tion is not responsible; but the prosecution of the work is ministerial in its character, and the corporation must therefore see that it is done in a safe and skilful manner."

It was held by this court, in *The City of Indianapolis v. Miller*, 27 Ind. 394, that such "a power is legislative in its character, and can only be exercised by an ordinance passed under the formalities required by law."

We do not regard the name or form of the order as of the substance of the thing. It may be done by an ordinance, by a motion, or resolution; but whatever mode may be adopted it must comply with the requirements of the charter. It must be in writing. It must be passed by a vote of a majority of the council when there is a petition, or by a two-thirds vote when there is no petition. The order must be entered of record, together with the vote on its passage, and the record must show that it was adopted by the requisite vote. The order must be followed by an advertisement for proposals to do the work. There must be a written contract, which must be reported to and approved by the council.

In the case under consideration there was no order made for making the improvement. There was no advertisement for proposals for doing the work. There was no written contract. It necessarily and unavoidably results that the city cannot be protected from liability on the ground that it was a proceeding under the charter. It was acting in violation of law. It was a trespasser, and is liable for its acts as such.

But suppose that the common council of said city had made an order, in due form of law, for the improvement of Washington street, had advertised for proposals, and had entered into a valid and legal contract for the making of such improvement, would such things be a justification of the acts complained of? We think not. The common council of a city has the undoubted right to establish the grade of a street, and may cause the same to be excavated at one point and filled at another; and the earth, gravel, or stone

excavated at one point may be used in making a fill at another point in the said street.

But the real and substantial question in the case under consideration is this: Had the common council the power to order or direct the cutting down of Frank street for the purpose of obtaining dirt or gravel with which to fill up Washington street? We think they possessed no such power. The owners of lots abutting on streets and alleys have an interest in them; and the right to their use as they were when they purchased the adjoining lots, subject to the paramount power of the common council, in the mode hereinbefore pointed out, to improve them, by establishing grades and making the improvements to correspond with the grades established. It is provided by section 68 of the charter, that "the common council are hereby invested with powers to pass by-laws and ordinances providing how and in what manner the repairs shall be made, and in what manner the same shall be assessed and collected from such owner or owners."

The above is a just and reasonable provision. It is alike just to the public and the owners of lots. There must be a plan of improvement adopted, and when this is done, the public and the private citizen will know their rights. We think that it is quite clear that the authorities of a city have no power to order the removal of earth, gravel, or stone from a street, unless it is done in pursuance of an order for the improvement of such street. If the common council of Delphi had established the grades of Washington and Frank streets in such city, and had made an order for their improvement in conformity to the grades established, there can be no doubt that the earth, gravel, and stone excavated in Frank street might have been used in filling up a low place in Washington street. By so doing the common council would have exercised the power they possessed over the streets and alleys of such city, and the excavation in Frank street would have been made as much for the improvement of that street as the fill in Washington street

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would have been for the improvement of the latter street.

It appearing from the allegations of the complaint that the common council of the city of Delphi had made no order establishing the grades and ordering the improvement of Washington, Wilson, and Frank streets; that the excavation was not made in Frank street for the improvement of such street; and that the work was not done in a careful and skilful manner, but that the same injured the street and damaged the property of the plaintiff, we are of the opinion that the court committed no error in overruling the demurrer to the complaint; and this being the only error assigned, it results that the judgment must be affirmed.

The judgment is affirmed, with costs.

B. B. Daily, D. H. Graham, S. E. Perkins, O. F. Baker, and S. E. Perkins, Jr., for appellant.

L. B. Sims and A. H. Evans, for appellee.

CURRY v. BURNETT and Others.

PROMISSORY NOTE.—*Assignment by former Partner in Firm Name as Collateral for Personal Debt.*—A. and B., partners, sold partnership property which they owned equally, to C. for \$5,200 and dissolved partnership. B. received afterwards from C. \$2,550, and one promissory note for \$1,050, and one for \$1,100, to the order of the late firm, in their partnership name, and A. received from C. \$550; B. subsequently purchased property for \$7,000, and A. and one D. became his security for that sum. B., to secure D. as his surety, assigned, in the name of the late firm, the two notes received from C., without A. consenting to said transfer. In a suit by A. to collect his share in the two notes so assigned, to which suit B., C., and D. were defendants, and in which D. by cross complaint against A. and C. demanded a recovery on the notes held by him;

Held, that A. was entitled to judgment against C. for \$2,075 and interest from the date of sale of the partnership property; and that D. was entitled to judgment against C. for the amount remaining due on the notes executed by C. and crediting the amount recovered by A.

APPEAL from the Knox Circuit Court.

DOWNEY, C. J.—Curry sued Stephen S. Burnett, Stephen Burnett, William Burtch, and George W. Patrick. In the first paragraph of the amended complaint he alleges that Stephen S. and Stephen Burnett, on the 12th day of August, 1867, by their certain promissory note of that date, promised to pay to the plaintiff and defendant Patrick, by the name and description of Curry & Co., the sum of ten hundred and fifty dollars, setting out a copy of the note. That on the same day, by their certain other promissory note, a copy of which is also set out, they promised to pay to the plaintiff and said Patrick, the further sum of eleven hundred dollars. That said notes were the property of said Curry and Patrick, each owning one-half thereof. That Patrick undertook to assign and transfer the said notes to Burtch, by writing on the back thereof the names Curry & Co., without the consent of the plaintiff; and that Burtch claims that he is the owner thereof, and entitled to collect them from said Burnetts. That he is now entitled to have and recover from said Burnetts the one-half of the amount now due on said promissory notes; that he is the owner thereof, and that there is now due to him, on account of his interest therein, the sum of fifteen hundred dollars.

In the second count he alleges that on the 12th day of August, 1867, he and said Patrick sold their interest in the furniture factory, lumber, fixtures, etc., belonging to Curry, Patrick, and Gardner; that they sold to Stephen S. Burnett one-half of said factory, etc., for five thousand two hundred and fifty dollars; that Burnett, in a few days thereafter, paid to Patrick, on account of said sale, two thousand dollars, and in a few months thereafter the further sum of five hundred and fifty dollars. That on the said 12th day of August, 1867, the defendants, Burnetts, made the notes set out in the first paragraph; that he received on account of said sale, from said Burnett, five hundred and fifty dollars and no more; that the said notes were made to said plaintiff and Patrick by the description of Curry & Co.; that of the said notes

there is due to him two thousand dollars, with the interest thereon. That on the 20th of March, 1868, Burtch and Patrick conspired together to cheat and defraud the plaintiff out of his interest in said notes, and Patrick, for that purpose, indorsed on the back of said notes the name Curry & Co., without his knowledge or consent; and then and there delivered the said notes to said Burtch, and he, by reason of said assignment claims to be the owner thereof, and that he is entitled to collect the same. Plaintiff says that there is due to him on said notes the sum of two thousand two hundred dollars.

Wherefore he demands judgment against Stephen S. and Stephen Burnett for the sum of three thousand dollars, and that Burtch and Patrick be adjudged to have no interest in said notes, and for general relief.

After some other steps which need not be noticed, Burtch filed a cross complaint, to which he made Curry, and Patrick, and the Burnetts defendants, and in which he alleged the making of said notes, by one of which the said Burnetts agreed to pay Curry and Patrick, by their firm name of Curry & Co., eleven hundred dollars, at the banking house of R. J. Kinney & Co., in Vincennes; and by the other they agreed, in like manner, to pay one thousand and fifty dollars; that afterward he became surety for Curry and Patrick for six thousand dollars, to Valentine Keyser, and Curry and Patrick indorsed the notes of the Burnetts to him; that the note to Keyser and those executed by the Burnetts remain unpaid; that notwithstanding the said assignment, Curry claims to be entitled to said notes, and to receive the money due thereon.

Wherefore he demands judgment against said Burnetts for three thousand dollars, and that Curry be adjudged to be not entitled to said notes, nor to any of the money due thereon, but that the same be awarded to him.

Burtch answered the complaint, first, by denying the fraud charged, and alleging that Curry and Patrick were indebted to Keyser, six thousand dollars, and to secure the payment

thereof, Curry and Patrick, and this defendant, at their request, and as their surety, executed their two notes to Keyser; that Curry and Patrick indorsed the notes mentioned in the complaint, to be held by him as collateral security to indemnify him from loss on account of the suretyship; that the notes to Keyser remain unpaid; second, that on the 12th day of August, 1867, Curry and Patrick sold their interest in the furniture factory, and received part cash therefor, as alleged in the complaint, and the notes sued on for the residue of the purchase-money. That the sale was made for the purpose of forming a partnership to purchase a saw mill, etc., and carrying on the business of sawing, etc., and said partnership was then formed by said Curry and Patrick, and the notes sued on were made payable in their firm name of Curry & Co.; that afterward, in pursuance of said agreement, said Curry and Patrick, on the 20th of August, 1867, bought of Keyser a saw mill, etc., for seven thousand dollars; and to secure the payment of six thousand dollars thereof, they, with defendant as their surety, executed to Keyser their notes, dated, etc., payable, etc.; that Patrick, with the assent of Curry, promised to, and did indorse the notes mentioned in the complaint to him to indemnify him as their surety, and that the Keyser notes remain unpaid; third, that on the 20th day of August, 1867, Curry and Patrick were partners, and as such, for value received, indorsed said notes to him; fourth, for answer to so much of the complaint as charges that said Patrick received the sum of two thousand five hundred and fifty dollars, the defendant says that Curry and Patrick were partners in the purchase of a saw mill, etc., and that the money so received by said Patrick was received and expended for and on account of said partnership.

The plaintiff replied to so much of the first, second, third, and fourth paragraphs of the answer of Burtch as sets up and charges the assignment of said notes to said Burtch; that he did not assign said notes to Burtch, or authorize any other person to do so; and that he and said Patrick were not

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partners, doing business under the name of Curry & Co. This paragraph was sworn to by Curry.

For reply to the first paragraph of Burtch's answer, he admits the making of the notes by him and Patrick to Keyser, but says that the said notes were given for a certain steam saw mill, etc., and when the notes were signed he and Patrick contemplated entering into partnership in the purchase of said mill; but he says that afterward, and between the 20th of August, 1867, and the 9th of September, 1867, said Burtch notified this plaintiff and said Patrick, that if said Curry was retained as one of the purchasers of said mill, etc., he would not permit said notes to be delivered to said Keyser; and that thereupon, by agreement between this plaintiff and said Patrick, and with the assent of said Burtch, the name of plaintiff was erased from said contract, and by like agreement said Patrick became the sole owner thereof, and plaintiff allowed his name to remain as surety with said Patrick on the notes to Keyser; and that he thereupon, as the agent of said Patrick, delivered said notes to said Keyser; and he says he never did at any time agree to the indorsement of the notes sued on to Burtch, but said Patrick and Burtch conspired, etc., as in the complaint.

For further reply to the first, and for reply to the second paragraph of the answer of Burtch, he admits that plaintiff and Patrick did sell to Burnett a portion of their interest in the furniture establishment, etc., of Curry, Gardner & Co., that is to say, the three-sixths thereof, for five thousand two hundred and fifty dollars; that a part was paid in cash, and appropriated as stated in the complaint; but the sale was not made for the purpose of purchasing the saw mill, etc., from Keyser, as stated in the answer, but after the sale they made an agreement with Keyser to purchase; that an agreement was drawn up and signed, and the notes for the deferred payments were also drawn up and signed, but before they were delivered to Keyser, Burtch refused to allow the notes to be delivered to Keyser if the name of Curry remained in said contract, as one of the purchasers; that thereupon, by agree-

ment, the name of said plaintiff was erased from the contract, and that of Patrick alone retained as the purchaser. The name of plaintiff was allowed to remain on said notes as a co-surety with Burtch, and not as principal, of all of which Burtch had notice; that on the 9th day of September, 1867, said Patrick took possession of said mill, etc., and the plaintiff worked for Patrick as his agent, and Patrick having possession of the notes mentioned in the complaint, retained the same till on or about the 20th day of March, 1868, when he demanded them of him, about which time he indorsed the same to Burtch as aforesaid, without his consent, by indorsing on them the names, Curry & Co.; and that said pretended assignment and delivery were for the purpose of indemnifying Burtch as surety for said Patrick, and for no other purpose.

Third, he admits that the whole amount due to Keyser has not been paid, but he says that one thousand dollars has been paid to him out of the property of this plaintiff; that Patrick and Burtch have sold the said mill, etc., purchased by Patrick from said Keyser, for nine thousand dollars, and that said sum of three thousand dollars has been received by said Burtch, in cash, and six thousand dollars in notes, and accepted by him and Patrick for and on account of said sale of said property; and that said money and notes are now in the hands of Burtch, and were taken and are now held by said Burtch as collateral security to indemnify and save said Burtch harmless on account of his suretyship for said Patrick on said notes due to Keyser, and which were accepted and are held by Burtch in the room and place of said Burnett's notes.

Fourth, and for a reply to the separate answer of Burtch, the plaintiff says, that on the 20th day of August, 1867, nor on any day since then, he and said Patrick were not partners doing business under the style of Curry & Co., and did not indorse the notes sued on to said Burtch; but Patrick, fraudulently, etc., and without any consideration whatever to him, indorsed said notes.

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Fifth, for reply to the fourth paragraph of the answer of Burtch, plaintiff says, that he and Patrick were not partners as in said paragraph stated, but said Patrick was the sole owner of said mill, and plaintiff had no interest in the same; and if said money was expended, as stated in said paragraph, it was so expended for the sole use of Patrick, and not otherwise.

For answer to the cross complaint, Curry says: 1. The same, in substance, as the reply of Curry to the first paragraph of the answer of Burtch. 2. The same, in substance, as the third paragraph of reply to Burtch's answer. 3. Curry also answered to the cross complaint, denying the assignment of the notes by him as alleged in the cross complaint, which paragraph was also sworn to by Curry.

Burtch, for reply to the several paragraphs of the answer to his cross complaint, denied each and every material allegation thereof. The Burnetts answered the complaint by a general traverse.

There was a trial of these issues by a jury, who returned the following verdict: "We, the jury, find the issues between the plaintiff and William Burtch for the plaintiff, and as to the issues between the plaintiff and Stephen S. Burnett and Stephen Burnett, also for the plaintiff; and that there is due the plaintiff from said Stephen S. Burnett and Stephen Burnett, on account of his interest in said notes, the sum of twelve hundred and five dollars and forty-four cents; and as to the issues between William Burtch and the said Stephen S. Burnett and Stephen Burnett, we find for the defendant Burtch, and that there is due from said Stephen S. Burnett and Stephen Burnett to their co-defendant Burtch, on account of the interest assigned to him by Patrick, the sum of twelve hundred and five dollars and forty-four cents."

A new trial was asked by the plaintiff for the reasons: 1. Improperly giving charge No. 8, at the instance of the defendant, as follows: "In any event, Mr. Burtch is, in this action, entitled to recover against the Burnetts the amount of Patrick's share in the notes in controversy, without regard

to how the accounts or business may stand—the mill business between Curry and Patrick.”

2. That the court erred in saying to the plaintiff's attorney, in the presence and hearing of the jury, “that it was unnecessary to make any argument to the jury in reference to the condition or state of the accounts between plaintiff Curry and defendant Patrick; that he would and did say to the jury that it made no difference how much money had been received by Patrick or Curry from defendants Burnetts on account of the sale of the furniture establishment; that in any event, plaintiff cannot recover more in this cause than one-half of the amount now due on the Burnett notes.”

3. That the verdict of the jury is erroneous, in this, that the assessment in favor of the plaintiff is too small.

This motion was overruled, and judgment rendered according to the verdict of the jury.

The only error assigned is the refusal of the court to grant a new trial.

The evidence is in the record, and it is agreed by the parties that if, in the opinion of this court, said instructions do not correctly state the law as applied to the evidence, judgment may be here rendered in accordance with law, as applied to the evidence, without a new trial.

It is clear, from the evidence and the verdict of the jury, that they found, and were justified in finding, that Burtch had no valid claim on Curry's interest in the Burnett notes; otherwise they would not have found the twelve hundred and five dollars and forty-four cents in favor of Curry.

We think the circuit court misconceived the rights of the parties, and that its position with reference thereto, as enunciated in the instruction to the jury above set out, and in the remark made to the counsel for the plaintiff, is wholly untenable. The evidence shows that Curry and Patrick were equally interested in the furniture factory, and in the portion thereof sold to the Burnetts; and there is nothing in the pleadings or in the evidence, so far as they are concerned, to show that the proceeds of the sale, embracing the notes in contro-

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versy, should not have been, and should not be, equally divided between them. No partnership accounts between them, growing out of their ownership of the furniture factory, are brought to light either in the pleadings or the evidence. As to the validity of the transfer of Curry's interest in the notes by Patrick to Burtch, as collateral security for the indemnity of Burtch as the security of Patrick on the note to Keyser, the jury, as we have already intimated, evidently found against that view of the case; and we think, from our examination of the evidence, that they were fully justified in so doing.

It is shown by the evidence that the price for which the interest in the furniture factory was sold was five thousand two hundred and fifty dollars. Patrick received all of the cash payment, which was two thousand dollars, and also one-half of the amount of the note which first matured, the note being for eleven hundred dollars, and the one-half of it five hundred and fifty dollars; and Curry received the other half of the amount of that note. Saying, then, that the proceeds of the note which has been paid have been equally divided between the parties, there is the two thousand dollars received by Patrick, the down payment, and the amount of the two notes yet due from the Burnetts, which is twenty-one hundred and fifty dollars, making, in all, for division, not computing interest, four thousand one hundred and fifty dollars. One-half of this amount, or two thousand and seventy-five dollars, with six per cent. interest thereon from the day of sale, August 12th, 1867, Curry should recover from the Burnetts on the notes mentioned in the complaint. Burtch, as the assignee of Patrick, should recover the residue of the amount due on said notes from the Burnetts.

The judgment of the circuit court is reversed, with costs, and the cause remanded, with instructions to the circuit court to enter judgment in accordance with this opinion, and for costs in favor of Curry.

J. C. Denny, G. G. Reiley, and W. C. Johnson, for appellant.
W. E. Niblack and W. H. DeWolf, for appellees.

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DÖEPFNER and Another v. THE STATE, on the Relation and
for the Use of ALTLAND.

JUSTICE OF THE PEACE.—*Contempt*.—A constable, having executions in his hands, the return day of which had passed, and money having been collected upon some of them, was required by the justice of the peace who had issued them to return them, but declining to do so immediately, he was committed for contempt to the county jail by the justice, although the trial of no cause was in progress.

Held, in a suit for this imprisonment, against the justice and the surety on his official bond, that the action could not be maintained against the surety, the act constituting no breach of the bond (DOWNEY, C. J., dissenting).

Held, also, that the executions with the returns thereon should have been admitted in evidence when offered by the defendants, to show the *animus* of the justice in what he did.

APPEAL from the Marion Common Pleas.

PER CURIAM.—Dœpfner was a justice of the peace, and the other appellant, Rhodius, was the security on his official bond. Altland was a constable, and had in his hands several executions, the return day of which had passed, and on some of which he had collected or received money, which executions had been issued by Dœpfner, on judgments on his docket. Altland called at the office of Dœpfner, and returned one of the executions on which he had collected some money. Dœpfner then required him to return the other executions, a list of which he had before him. He declined to do so then, but promised to do so in the afternoon; and was about going out of the office, when Dœpfner ordered his arrest by one Wuest, a man who was present, for contempt of the authority of his court. Dœpfner commenced writing an entry on his docket in the matter of the contempt, and Altland commenced making out the returns on the executions, during or before which time Dœpfner informed him that he should send him to jail for three hours for such contempt. Dœpfner having completed the entry on his docket, made out a *mittimus* for the commitment of Altland to the county jail, and appointed Wuest to execute the same.

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Altland then handed the executions to Dœpfner, and was taken to jail by Wuest, where he was imprisoned for three hours, according to the *mittimus*. Dœpfner had, both orally and in writing, requested Altland to return the executions prior to the proceeding for contempt. Dœpfner was not engaged in the trial of any cause at the time when he so ordered Altland into custody and committed him to the jail.

Altland brought this action in the name of the State, on his relation, against Dœpfner and Rhodius, his security on his official bond, to recover damages for the injury sustained by him. In his complaint he sets out the bond and condition, and, for a breach, alleges that Dœpfner did not faithfully discharge his duties as such justice of the peace, in this, that he did, on, etc., while the plaintiff, who was then and there a constable, etc., was in the office of said Dœpfner, unlawfully, wrongfully, oppressively, and corruptly, by color of his office, etc., cause the plaintiff to be arrested on a pretended charge of contempt, and then and there caused him to be detained in custody and imprisoned in his office for the space of one hour, during which time the said Dœpfner unlawfully, wrongfully, oppressively, and corruptly, and without any probable cause whatever, adjudged the plaintiff guilty of said pretended charge, and that he be imprisoned in the county jail for the space of three hours, and that he pay costs, etc.; and he then for the pretended cause aforesaid, committed him to jail for the space of three hours, against his will and consent; that at the said time when, etc., there was no judicial proceeding in progress, before said Dœpfner, as such justice of the peace, and he well knew that all of said proceedings were unlawful and oppressive.

The defendants filed separate demurrers to the complaint, which alleged that the complaint did not state facts sufficient to constitute a cause of action. These demurrers were overruled and the point was reserved by exception. The defendants then answered separately, by a general denial. Afterwards they filed a second paragraph, which, however, we

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need not more particularly notice, as no question with reference to it need be decided by us.

There was a trial by jury, and a verdict and judgment for the plaintiff, a motion for a new trial having been overruled.

The first question is as to the sufficiency of the complaint. A majority of the court are of the opinion that the justice of the peace had no jurisdiction or power to cause the arrest and imprisonment of the constable; that it was an act for which, as justice of the peace, he had no legal authority whatever; and therefore, as the security is only bound that he shall faithfully discharge his duties as justice of the peace, and as this was not a duty which he did or could legally do as justice of the peace, that the surety is not responsible, and that the demurrer to the complaint should have been sustained.

The defendants, on the trial, offered in evidence the executions and returns on them, some sixteen in number, which were in the hands of the constable, and which he had not returned, in order to show, so far as they would show, the grounds on which the justice acted in ordering the arrest and imprisonment of the appellee, but the court refused to allow them to be given in evidence. We think they should have been allowed to go in evidence to show the *animus* of the justice in what he did.

The judgment is reversed, with costs, and the cause remanded.

DOWNEY, C. J.—I am unable to concur in the opinion of the majority of the court in holding the complaint bad.

The condition of the bond of the justice on which the suit is brought is, "that the said Charles F. Doepfner shall faithfully discharge his duties as such justice, and pay over on demand to the person entitled or authorized to receive the same, all moneys that may come to his hands as such justice of the peace, during his continuance in office," etc. The question may not be the same that it would be if the

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justice were sued alone, and not on the bond. There may be many acts for which a suit might be sustained against the justice, as an individual, which would afford no cause of action against him and his securities on his bond.

In the case of *The State, on relation of Conley, v. Flinn*, 3 Blackf. 72, the action was against the justice of the peace and his sureties, on their bond, and the breach was that the principal had "acted illegally, oppressively, and corruptly in his office, in this:" setting out the particulars of such malfeasance. The court held that if a justice of the peace, in the discharge of any of his ministerial or judicial duties, act corruptly, to the injury of a party, his conduct is a breach of the condition of his official bond. And the court held in that case, that it made no difference whether the act was ministerial or judicial; the securities and the justice were equally liable, if the act was done corruptly. That the sureties were responsible for all acts of the justice, committed by virtue of his office, and for which, exclusive of the bond, he would be individually responsible.

In *The State, on relation of Robinson, v. Littlefield*, 4 Blackf. 129, which was an action against the justice of the peace and his securities, on their bond, two breaches were assigned; first, that the justice, while acting as such, did not faithfully perform his duties as prescribed by law; and second, that the justice issued a *capias ad respondendum* against the relator on a charge of his having assaulted the justice; that the relator was accordingly arrested and brought before the same justice; that the justice unlawfully, and oppressively refused to the relator a change of venue in the cause, and also refused him a trial by jury; that the justice, for the supposed assault upon himself, rendered a judgment for three dollars with costs against the relator; and further, that during the said trial, the justice, without cause, fined the relator three dollars and costs for an alleged contempt, issued an execution against him for the same, and thereby caused him to be imprisoned for twenty-four hours.

The court held the assignments of breaches bad, and

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remarking with reference to the second, said: "Assuming the justice to have acted oppressively and unlawfully as the declaration alleges, still that does not show a cause of action against the sureties. The declaration should have stated that the justice had acted corruptly, or that he knew his conduct to be unlawful. In cases of this kind the sureties are not liable for the unintentional mistakes in judgment made by the justice, however oppressively such mistakes may have operated against the party complaining."

In *Gowing v. Gougill*, 12 Iowa, 495, where the action was on the bond, and the substance of the breach was that the justice, through favor, and with intent to defraud the plaintiff, heard and determined a cause at 10 o'clock a. m., of the day, before the hour fixed, without the consent of the plaintiff, and that when the proper hour of trial arrived, he refused to set aside the judgment, it was held that the action would lie on the bond.

In *Horton v. Auchmoody*, 7 Wend. 200, it was held that when a justice acts without acquiring jurisdiction, he is a trespasser; but having jurisdiction, an error in judgment does not subject him to an action. He is entitled to the protection afforded to a judge of a court of record. See, also, *Butler v. Potter*, 17 Johns. 145; *Stewart v. Hawley*, 21 Wend. 552.

In *Tompkins v. Sands*, 8 Wend. 462, the court discriminates between acts which are ministerial and those that are judicial, saying that "it may sometimes be difficult to determine whether an act is judicial or ministerial. A justice of the peace performs acts of both kinds, and which are clearly distinguishable. He issues process in the first instance, and in doing so he acts ministerially, his judgment is not at all exercised. When the parties appear before him, and the cause is heard, he renders judgment; he then acts judicially. After judgment, he issues execution; he then again acts ministerially."

The court then, after a review of some of the authorities, concludes: "On a review of the cases, the principle must

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be considered as settled, that for a judicial act, no action lies, but for an injury arising from the misfeasance or nonfeasance of a ministerial office, the party has redress in an action on the case; but in all cases where the defendant is sued for an act in which he is bound to exercise his discretion, the action will not be sustained unless it appear that the act complained of was done wilfully and maliciously. The strongest charge in the declaration in this case is, that the defendant, acting as justice of the peace, has unjustly and oppressively prevented the plaintiff from appealing and thereby reversing a judgment rendered against him, etc. I incline to think this equal to a charge of corruption." But the case was made to turn on the point that the act which the justice had failed and refused to perform—the approval of an appeal bond—was a ministerial, and not a judicial act.

In *Gregory v. Brown*, 4 Bibb, 28, it is decided that no suit lies against a justice of the peace for an act done judicially and within the scope of his jurisdiction, unless he acts corruptly or from impure motives.

Following these cases, and especially those in this court, I am of the opinion that the complaint in this case was sufficient. I do not think the question turns on the fact whether the justice of the peace had jurisdiction, or not, of the matter before him. He was acting in the matter as a justice of the peace, and claiming to have jurisdiction. He ordered the arrest of Altland, entered the matter relating to the contempt on his docket, and, as a justice of the peace, adjudged Altland guilty of the contempt, made out and signed the *mittimus*, and appointed Wuest to act as constable. I think that if he acted unlawfully, wrongfully, oppressively, and corruptly, as alleged in the complaint, while professedly acting as a justice of the peace, to the injury and damage of the appellee, he and his surety are, under these decisions, liable to be sued on their bond, whether he had rightfully and really jurisdiction of the matter or not. But I do not think it clear that he had not jurisdiction. It seems to be settled, that courts of all grades have power

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to punish, by fine and imprisonment, their officers who shall abuse the process of the court or fail to execute and return it according to law and the command of the writ or process. This is a power which would seem to be necessary to the existence of such courts and the proper exercise of their allotted functions. See *The State, on the prosecution of Leavenworth, v. Tipton*, 1 Blackf. 166; 2 Hawk. P. C. 5.

It is provided by statute, in this State, that "justices shall have power to subpoena witnesses and enforce their attendance by attachment and fine, not exceeding five dollars; to enforce order when judicial proceedings are in progress before them, by fine not exceeding five dollars, and imprisonment not exceeding three hours." 2 G. & H. 589, sec. 46. I am of the opinion, however, that this is not an enumeration of all the cases in which a justice may fine or imprison for contempt. May he not punish those who have been summoned to appear before him as jurors and have failed to do so? May he not attach and punish those who obstruct the execution of his process, or prevent the attendance of witnesses? If he may, then there are cases where he may punish for contempt which are not enumerated in the statute. The fact that the justice in this case went about the business in an unusual or awkward manner, does not affect this question. It is the power to do the act, and not the manner of it, which is in question.

The next question relates to the sufficiency of the evidence to sustain the verdict. It will be seen from what I have already said, and from the cases cited, that it was essential, in order to make out a cause of action on the bond against the justice and his surety, that he should have acted corruptly. From the facts in the case, it fully appears that Altland, the constable, by failing to return the executions, the return day of which had already passed, and to pay over the money collected, had been guilty of a gross violation of official duty and disregard of the command of the writs, which required him not only to execute them, but also to return them within a specified time. He had failed to per-

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form these duties, had been reminded of his failure, and notified, orally and in writing, to do so, and still refused. After all this, and in good faith, so far as I can see, the justice proceeded against him for contempt as stated. I see no evidence of the corruption which is alleged in the complaint, and required by law to make the defendants liable on the bond.

I think the judgment ought to be reversed for insufficiency of the evidence, and for the improper exclusion of the executions and the returns thereon as evidence, but not on account of the insufficiency of the complaint.

J. Hanna and *F. Knefler*, for appellants.

J. S. Harvey, for appellee.

THE PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILROAD
COMPANY *v.* EHRHART.

RAILROAD.—*Injury to Animals.*—*Fences.*—*Cattle-Guards.*—The fencing of a railroad contemplated by the statute of March 4th, 1863, providing compensation to the owners of animals killed or injured by the cars, etc., of a railroad company, includes the putting in of proper cattle-guards to prevent animals from passing from streets and highways upon the railroad track on each side of said streets and highways.

APPEAL from the Wayne Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellant to recover damages for killing a cow by the defendant on her track.

Trial, verdict and judgment for plaintiff. Motions for a new trial and in arrest of judgment overruled.

The motion in arrest was made on the assumed ground that two out of the three paragraphs of the complaint did not state facts sufficient, etc. One of the paragraphs of the complaint, at least, seems to be good. The motion in arrest

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was not addressed to it, and no objection is made to it here. That paragraph is based on the statute. No error was committed in overruling the motion in arrest.

The only other question is whether the evidence sustained the verdict.

The cow was killed in the town of Dublin. The evidence, as set out in the bill of exceptions, leaves the matter in some uncertainty, as to the point where the cow got upon the track. But we think it may be fairly inferred from the evidence, that the cow passed on to the track from a street, there not being a sufficient cattle-guard to prevent it, and that when thus upon the track, between two streets, she was struck by the locomotive of the defendant.

There was a diagram of the ground used on the trial, and referred to in the testimony of some of the witnesses, which is not put into the bill of exceptions. Perhaps if the diagram had been set out, it would have enabled us the better to understand or apply the evidence.

There is nothing in the evidence which shows that it would have been illegal or improper to have fenced the road in the town of Dublin, and the fencing of the road includes the putting in of proper cattle-guards to prevent animals from passing from streets and highways upon the railroad track on each side of such streets and highways. *The Indianapolis, etc. Railroad Co. v. Kibby*, 28 Ind. 479. '

We cannot say that the verdict is not sustained by the evidence.

The judgment below is affirmed, with costs.

J. B. & J. F. Julian, and *G. A. Johnson*, for appellant.

W. S. Ballenger, for appellee.

 Maxwell v. Boyne.

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86	190
160	10

86	120
160	439

36	120
167	457

NUISANCE.—*Mill Dam.—Interrogatories.*—In an action to recover damages for the erection and maintenance of a mill dam which caused the overflow of the plaintiff's land, and asking to have the same abated as a private nuisance, the court submitted an interrogatory to the jury as to the height of the dam at the time of the trial, and also an interrogatory whether the dam was higher at that time than it was when the mill property was sold by the plaintiff to the defendant's grantor. To both of these interrogatories the plaintiff objected.

Held, that the interrogatories were proper; that the answers might aid the court in determining whether the nuisance should be abated; but that the evidence on these points should not affect the question of the plaintiff's recovery of damages.

SAME.—*Judicial Discretion.*—The discretion resting in the court as to ordering the abatement of a private nuisance is a legal discretion, to be exercised affirmatively whenever the interests or happiness of individuals or the community may require it.

INTERROGATORIES TO JURY.—*Answers.*—The court instructed the jury that if there was such a want of evidence as to any fact to which an interrogatory was directed that they could not determine the affirmative or negative, they should so answer.

Held, that the instruction was erroneous; that if there was evidence on the subject, the jury must determine or disagree.

APPEAL from the Rush Circuit Court.

BUSKIRK, J.—This was an action by appellant against the appellee to recover damages for the erection and maintenance of a private nuisance, and to cause the abatement thereof.

The complaint alleges, in substance, that the plaintiff, in 1839, by deed of that date, authorized and permitted Jesse and Aaron Heacock and their assigns to erect and maintain, across Blue river, a mill dam of a certain height; that subsequently the plaintiff became, by purchase and conveyance, the owner of the said mill and the land on which the same was situate, and afterward sold and conveyed the same, subject to the water and mill privileges previously granted by him and as they then existed; that the defendant had become the owner in fee of the said land, mill, and privileges, and that he and others, through whom he claimed title, had, without the consent and over the objection of plaintiff, made

the said dam fourteen inches higher than it was when he conveyed the same; and that by reason of such increased height the back-water from the said dam had overflowed the lands of him, the said plaintiff.

The prayer of the complaint was, that he should recover damages in the sum of three thousand dollars, and that the said dam should be reduced to the height that it was when he had conveyed the same.

The defendant answered by a general denial. The cause was tried by a jury, resulting in a general verdict for the defendant. The court submitted to the jury the following interrogatories, namely:

"1. What was the height of the dam at the time Maxwell sold the mill property to Randolph?"

"2. What was the height of the dam at the time of the commencement of this suit, September 10th, 1867?"

"3. What is the height of the dam now?"

"4. Is the dam higher now than when the mill property was sold by Maxwell to Randolph, and if so, how much?"

To the first interrogatory the jury answered: "Evidence is not sufficient to establish the height."

The answer to the second was: "Eight feet, one inch, and five-eighths of an inch."

To the third the answer was: "Seventy-nine inches."

To the fourth the jury answered: "Evidence is not sufficient to show."

The appellant objected to the giving of the third and fourth interrogatories to the jury, but the objection was overruled, and the appellant excepted and presents the exception by a bill of exceptions.

The court thereupon charged the jury as to how they should answer said interrogatories, as follows: "You are required to answer the following interrogatories:" (Those given above.) "In answering these interrogatories you will be governed by the evidence. As a fair preponderance may show the fact to be, such will be your answer to each of these interrogatories. If as to any of them there is such

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want of evidence that you cannot determine either the affirmative or the negative, you would answer to that effect. In such a case, a proper form of answer would be, 'the evidence is not sufficient,' or 'will not enable us to determine.'" To which charge of the court the appellant excepted, and presents the exception by bill of exceptions.

The appellant moved the court for a new trial, which was overruled, and an exception was taken. The court then rendered final judgment for the defendant.

The motion for a new trial was in these words, namely:

1. "Because the plaintiff was surprised by the evidence of defendant's witnesses, Benjamin Nixon and Samuel Carr, in reference to the height of the dam at the time of the trial, which ordinary prudence could not have guarded against."

2. "Because the special findings of the jury, in answer to the interrogatories presented to them are not sustained by evidence, and are contrary to law."

3. "Because the general verdict of the jury is not sustained by sufficient evidence."

4. "Because the general verdict of the jury is contrary to law."

5. "Because the plaintiff has discovered new and material evidence, since the trial of this cause, which could not, with reasonable diligence, have been discovered and produced at the trial."

6. "Error of law occurring at the trial and excepted to by the party making the application."

7. "Because the court erred in allowing evidence of the height of the dam after the commencement of the action, and a measurement taken when the trial was in progress, to go to the jury. Objected to. Excepted to by the plaintiff at the proper time."

8. "Because the court erred in allowing the third interrogatory to be propounded to the jury. Objected to. Excepted to by the plaintiff at the proper time."

9. "Because the court erred in allowing the fourth inter-

rogatory to be propounded to the jury. Objected to, and excepted to at the proper time by plaintiff."

10. "Because the court erred in charging the jury, that if they could not determine from the evidence either in the affirmative or the negative, in answering the interrogatories presented to them, they could answer, 'The evidence is not sufficient to determine.' Objected to, and excepted to at the proper time by the plaintiff."

11. "Because the court erred in receiving the verdict and discharging the jury without an answer, except that 'the evidence was not sufficient,' to the first and fourth interrogatories propounded to the jury. Objected to, and excepted to at the proper time by the plaintiff."

There is an assignment of error upon each cause for a new trial, with an additional one for the error of the court in overruling the motion for a new trial. The conclusion to which we have come renders it unnecessary for us to examine any of the questions presented but those based on the first, tenth, and eleventh reasons for a new trial.

The first error relied upon is based upon the action of the court in admitting evidence as to the height and condition of the dam at the time of the trial, and in submitting to the jury interrogatories three and four, which were based on the testimony of such witnesses.

This action was commenced in Sept., 1867, and was tried in April, 1868. For the erection and maintenance of a nuisance, a person injured thereby may institute and maintain an action for each day that it may be maintained, but he can only recover for such damages as he had sustained prior to the commencement of the action, and a judgment would be a bar to any action for an injury sustained prior to such recovery. Nor could a plaintiff in such action recover for any damage that he might sustain between the bringing of the action and the time of recovery. Nor could defendant defeat the right of the plaintiff to recover for injuries sustained prior to the commencement of the action by proving that the nuisance had been abated subsequent to the

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bringing of the suit, or diminish the amount of the recovery by proving, as in a case like this, that the dam had been lowered, and that in consequence thereof, the plaintiff would in the future sustain less injury. The evidence which was admitted to show the height of the dam at the time of the trial was not admissible, either to defeat the right of the plaintiff to recover, or to diminish the amount of his recovery.

But in the case under consideration, the plaintiff sought to accomplish two objects: first, to recover for an alleged damage to his property; and secondly, to obtain an order for the abatement of the nuisance complained of.

The case of *Cromwell v. Lowe*, 14 Ind. 234, is analogous to this. That was an action to recover damages for the erection of a dam by which the lands of the plaintiff were overflowed. In that case, as in this, the plaintiff not only sought to recover damages, but also an abatement of the nuisance. In that, as in this, evidence was admitted as to the height and condition of the dam at the time of the trial, and the jury found specially in reference thereto. In that case the court say: "It does not follow as a consequence of the recovery of damages, that the subject of the action shall, therefore, be abated, any more than an order to abate should follow a conviction on a criminal prosecution for a nuisance. 2 R. S. 429; *Howard v. The State*, 6 Ind. 446. This being so, there were really two branches to the case; the one for money damages, the other for specific relief. It was decided by this court, in the case above cited, that it was discretionary with the court whether the removal of the nuisance should be ordered upon the evidence adduced on the trial. So, in civil cases, we suppose the court might or might not make the order. The special findings of the jury, directed to the determination of facts necessary to be considered in that behalf, could do no harm, if they were not conclusive upon the court, a question which we need not now determine."

We are of the opinion that the evidence complained of was properly admitted to aid the court in determining whether

an order should be made to abate the nuisance. An order for the abatement of a nuisance does not necessarily follow a conviction in a criminal case, or a verdict and judgment for damages in a civil suit, but we do not consider it a matter of discretion in the court. It was said by this court in *Cromwell v. Lowe, supra*, "So, in civil cases, we suppose the court might or might not make the order." If it was intended by the words "might or might not" to convey the impression that it was a matter purely within the discretion of the court, it does not meet with our approval, and as to that point is overruled, but if it was intended to hold that the court might or might not make the order according to whether the facts in the case might or might not justify and require such order, then it meets with our entire approval; for we hold that it is the duty of the court to make the order whenever the interest and happiness of individuals or the community may require such nuisance to be abated in whole or in part.

Although this was evidence admissible for the purpose above indicated, and adduced before and in the hearing of the jury, it was not competent for them to consider it in determining the right of the plaintiff to recover, or the measure of his damages. In all such cases, the court should inform the jury of the purpose for which the evidence was admitted, and should instruct them to only consider it in reference to such questions as might be submitted to them to aid the court in determining whether the nuisance should be abated. Where this is not done, it may injuriously affect the rights of the parties.

The court committed no error in admitting the evidence complained of, and it necessarily results that there was no error in submitting to the jury interrogatories three and four, as they were based upon such evidence.

The next error assigned is based upon the instruction of the court to the jury as to their duty in answering the interrogatories. The first part of the instruction was clearly right, and no objection has been urged to that part of the charge. The portion complained of is in these words:

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"If as to any of them there is such a want of evidence that you cannot determine either the affirmative or negative, you would answer to that effect. In such a case a proper form of answer would be, 'the evidence is not sufficient' or 'will not enable us to determine.'"

It was as much the duty of the jury to answer the interrogations according to the preponderance of the testimony, as it was to render a general verdict. If there was no evidence on the subject embraced in the interrogatory, then the jury might have answered, there is no evidence; but where there was some evidence, it was the duty of the jury to consider, weigh, and determine on which side was the preponderance. If the evidence was so evenly balanced that there was no preponderance on either side, then they should have found against the party upon whom the burden of the issue was, upon the point involved in the interrogatory. A jury should give to every cause submitted to them the most patient, careful, and deliberate consideration; they should not act hastily or jump at conclusions; they should consider and weigh the evidence; they should patiently and attentively listen to the argument of counsel and duly consider the same in consultation; they should apply to the facts as found by them, the law as given to them by the court; and when they have done these things, the law, public policy, and their oaths alike impose upon them the imperative duty of deciding according to the preponderance of the testimony. The public, as well as the parties litigant, are interested in the prompt and speedy administration of justice, and in the prevention of the prolongation of litigation. Juries are, frequently, too much inclined to become stubborn and antagonize each other, and to wrangle and disagree. Such juries might regard the instruction under consideration as an invitation to disagree, or an excuse for not answering the interrogatories. It is true, that a jury may be unable to agree upon the answer to an interrogatory, as they are upon a general or special verdict; when such is the case, they should report to the court the fact of their dis-

agreement, when the instruction of the court may aid them, or the agreement or concessions of counsel may relieve them of the duty of further considering the question upon which they disagreed. But if they are unable to agree, the court should discharge the jury and award a *venire de novo*.

The case of *Buntin v. Rose*, 16 Ind. 209, is directly in point, and strongly supports the views we have expressed. In that case the court had instructed the jury that they should find upon the interrogatories, as they were pertinent to the issues, but had, at the request of the plaintiff, further instructed them, that "if the evidence given to establish or disprove these facts were evenly balanced, they might respond to the interrogatories that they did not know, and still return a general verdict," and refused to instruct the jury, that "if there is any evidence tending to prove or disprove the questions put to them, they must find upon them one way or the other, although the evidence is conflicting."

This court held that the court below erred in refusing to instruct as requested. We approve of the ruling in that case. We think the court erred in giving that portion of the instruction complained of.

The appellant objected to the discharge of the jury, and asked the court to require them to give full and responsive answers to the interrogatories submitted; but the court overruled the motion and discharged the jury, to which the appellant excepted, and this is assigned for error.

It is the duty of the court only to submit to the jury such interrogatories as are pertinent to, and cover the issues, or some one of them, involved in the cause. If interrogatories are prepared by counsel and submitted to the court, which are not pertinent to the issues, or not in proper form, the court may alter and change them, or may prepare others; but when interrogatories are submitted to a jury that are pertinent to, and embrace the issues, the parties, and each of them have the plain and undeniable right to have plain, full, and responsive answers; and either party may demand of the court that the verdict be not received, and that the

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jury be kept together and directed to answer fully. See *Allen v. Davison*, 16 Ind. 416; *Ellston v. Scott*, 19 Ind. 290; *Buntin v. Rose*, *supra*; *Noble v. Enos*, 19 Ind. 72; *Noakes v. Morey*, 30 Ind. 103.

The answers to the first and fourth interrogatories were not full and responsive. The court erred in receiving the verdict, and discharging the jury. Several other errors were assigned and have been discussed, but as they relate to matters occurring on the trial that are not likely to occur again, we will not consider them.

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

A. B. Campbell, for appellant.

L. Sexton, J. H. Mellett, and M. E. Forkner, for appellee.

POWELL v. HOLMES.

APPEAL from the Marion Circuit Court.

WORDEN, J.—Action by the appellant against the appellee to recover damages for the alleged shooting of a cow belonging to the plaintiff.

Trial by the court, finding and judgment for the defendant.

There is no question before us but the sufficiency of the evidence to sustain the finding.

The evidence is palpably conflicting and, as we think, pretty nearly equally balanced. There is certainly no very great preponderance either way.

The judgment below is affirmed, with costs.

J. Milner and S. J. Peele, for appellant.

R. B. Duncan, J. S. Duncan, N. B. Taylor, and E. Taylor, for appellee.

TURNER and Others v. COOK.

DEMURRER.—*Verification of Complaint.*—A demurrer assigning for cause that a complaint does not state facts sufficient to constitute a cause of action, does not raise any question as to the verification of the complaint.

SAME.—*Defect of Parties.*—A demurrer assigning for cause that the complaint does not state facts sufficient to constitute a cause of action does not present the question of defect of parties.

PRACTICE.—*Verification of Pleadings by Infants.*—The statute requiring the verification of pleadings does not apply to infants. A verification by the next friend is sufficient.

WILL.—*Evidence.*—*Opinion of Witness as to Testamentary Capacity.*—The naked opinion of a witness, not an expert, as to a testator's soundness of mind is not competent evidence.

EVIDENCE.—*Declarations of Deceased Husband.*—The widow of a testator cannot give in evidence communications made to her by her husband during marriage.

WILL.—*Execution of.*—It is not necessary that the testator should, at the time of executing the will, inform the subscribing witnesses that the instrument which they are to sign is a will.

SAME.—*Subscribing Witnesses.*—The testator need not see the witnesses subscribe their names to the will; it is sufficient if the instrument is subscribed in his presence. The witnesses must know that the paper which they have subscribed is the one which the testator signed.

SAME.—*Undue Influence.*—The fact that a will made ten years prior to one being contested was procured by undue influence, should not be submitted to the jury as a circumstance against the will in controversy.

PRACTICE.—*Proceeding to Contest a Will.*—*Burden of Proof.*—In a proceeding to contest a will which has been admitted to probate, the burden of proof is on the plaintiff.

APPEAL from the Vermillion Common Pleas.

DOWNEY, C. J.—This was a suit brought by the appellee, Cook, one of the heirs of George A. Turner, deceased, against the appellants, the widow, heirs, and devisees of said deceased, to contest the will of the deceased. The complaint is not verified by Cook, but is verified by the next friend.

The grounds alleged for setting aside the will are the unsoundness of mind of the testator and the undue execution

36	129
144	489
86	129
154	84
154	86
36	129
1169	156
36	129
171	433

of the will. It does not appear whether the executrix, who was the widow, named in the will, had qualified or not.

Two of the defendants, Elizabeth Turner, the widow, and Robert A. Turner, a son of the deceased, demurred to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and the point reserved by entering the proper exception.

They then answered by admitting (what was not charged) the execution of the will, and that it was proved and admitted to record by the verdict of a jury and judgment of the court, a copy of which judgment was filed with the answer, but denying each and every other allegation of the complaint. The other defendants made default.

There was a reply filed to the answer, prompted, we presume, by the liberality of the defendants in making admissions in their answer.

A trial by jury resulted in a general verdict that the will in controversy was not the will of the deceased, and not valid; also the following answers to interrogatories, to wit:

1. "Did the testator make his mark to the will in controversy?" "Yes."

2. "Did any two of the subscribing witnesses to the will see the testator sign the same?" "No."

3. "Did the testator, after the signing of the will, declare, in the presence and hearing of the subscribing witnesses, that the instrument was his will?" "No."

4. "Had the testator, at the date of the signing of the will, a sound, disposing mind and memory?" "No."

5. "Were the witnesses to the will so situated that they could see the testator make his mark at the time he did so, if they had chosen so to do?" "Yes."

There was a motion for a new trial, for the following reasons:

1. The verdict and findings of the jury are not sustained by sufficient evidence.

2. The verdict and findings of the jury are contrary to the evidence and the law.

3. Error by the court in refusing to allow the defendant Elizabeth Turner, wife of the testator, to testify as to the soundness of his mind; to declarations made by him to other persons; and to directions given to her by him with reference to the execution of the will, on the day before and on the same day on which the will was executed.

4, 5, and 6. Giving and refusing instructions alleged to have been improperly given and refused.

This motion was overruled, and judgment rendered setting aside the probate of the will and declaring it invalid, and for costs.

The first and second assignments of error cover all the points in the case. They are: 1. The overruling of the demurrer to the complaint. 2. The refusal to grant a new trial.

Two objections to the complaint are urged. 1. That the complaint should have been verified by Cook, and not by the next friend. 2. That the executrix should have been made a party defendant, or the complaint should have alleged that there was no executor.

The first objection is not raised by a demurrer to the complaint alleging that it does not state facts sufficient. *Denny, Adm'r, v. Moore*, 13 Ind. 418. But it cannot be admitted that an infant plaintiff, suing by a next friend, must personally verify his complaint. He may be too young to take an oath. The section of the statute requiring the complainant to verify his complaint by his affidavit must be construed to apply to adults and not to infants. The verification in this case, by the next friend, was sufficient.

The second objection to the complaint is, that there is a defect of parties defendants; that the executrix is not made a party. This objection is probably without much point, as the widow is named in the will as the executrix, and she is a party defendant, though it does not appear whether she ever qualified or not. The demurrer to the complaint was

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not, however, for defect of parties, but was for the reason that the complaint did not state facts sufficient to constitute a good cause of action. The demurrer did not present the question as to defect of parties. *Collins v. Nave*, 9 Ind. 209; *Little v. Johnson*, 26 Ind. 170.

Several questions are presented arising out of the motion for a new trial. Elizabeth Turner, the widow and one of the defendants, being on the stand as a witness, the defendants proposed to prove by her that at the time the testator made the will in controversy he was of sound mind; also the declarations which she heard the testator make to others, and especially to the subscribing witnesses, in her presence and hearing; and the conversations between him and the subscribing witnesses during the evening the will was made, and between the testator and other persons on the day before the will was made; also the declarations of the testator made to her in giving directions to her the day the will was made and the day before the will was made, in reference to the execution of the will in controversy. Which evidence was excluded by the court, and the point reserved by exception.

This offer was not definite enough to warrant us in saying that the court erred in refusing her testimony. If it was proposed to have her express a naked opinion as to his soundness of mind, then the evidence was not admissible; so if it was proposed to have her narrate communications from him to her and base her opinion upon them as to his sanity. And unless we knew what declarations and conversations of his to and with other persons it was proposed to have her state, and that they related in some way to the questions in issue, we could not say that any error was committed in not allowing her to testify. As to his communications or declarations to her, they were clearly inadmissible. 3 Ind. Stat. 560, sec. 2.

We have examined the instructions given, and those asked and refused, and are of the opinion that the common pleas

misconceived the law in several respects in charging the jury.

The evidence shows that in 1857 the testator made a former will. Subsequently, and probably in 1859, he had had another will written, but it had not been signed. At the date of the will in question, Elizabeth Turner, the wife of the deceased, went to the person who wrote the last will, stating to him that she came by the direction of her husband to get him to go and see the blank will executed. She produced to him the first will, as well as the one unsigned, and after reading them, he suggested that a new one should be written, for the reason, as he says, that the unsigned will spoke of a filly, which he thought would not be a filly then, on account of the lapse of time. Accordingly, he wrote the will in question and gave it to Mrs. Turner, giving particular directions to a Mrs. Mayer, who accompanied Mrs. Turner, as to the execution of it. These several wills seem to have been copied, substantially, one from the other. The will in question, following the others in this respect, gave to Anna Caroline, a daughter of the deceased, an interest in the personal property in remainder after the death of the widow, if any should be left unconsumed by the widow. Anna Caroline had died after the writing of the unsigned will, but before the making of the will in question.

With reference to this feature of the case, the court instructed the jury, among other things, as follows:

"Extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the court. But if a man in his old age becomes a very child again, and does not know the difference between the wants of his dead and living children in reference to property, but makes provision in his will for both the dead and living children, he is no more capable of making a will than a natural fool, a child, or a lunatic."

There was no circumstance disclosed in the evidence to which this instruction could relate, except that of the mention of the name of Anna Caroline, as above, in the will in question. We think that fact with the attending circum-

stances did not justify the giving of this charge. We think the court gave to it too much prominence and conclusiveness. Its force and effect as evidence should have been left to the jury in connection with the other facts.

Nicholas Mayer, Martha Mayer, and James McLaughlin were the subscribing witnesses to the last will. Mrs. Mayer, who seems to have been most attentive, narrates the facts with reference to the execution of the will as follows: "I reside near Indianapolis, Indiana. Three years ago I resided with my husband near George A. Turner's, on his land in Vermillion county, Indiana. I knew him for nine months before his death. Saw him frequently, almost daily. We carried water from his house. I have often conversed with him. I was at his house the day and evening the will was made. I was invited to go there at that time. I went with my husband, Nicholas Mayer. That day and evening I talked with the old man and with the family. The old lady brought me the will. Mr. Turner told her to hurry. He said: 'Elizabeth, hurry; tend to this business first, we can talk afterwards.' Mrs. Turner and I got the will immediately from the next room, and came into the sick room where Mr. Turner was. I sat down and read the will over to myself first, so that I could read it better to Mr. Turner. I then sat on Mr. Turner's bed and read the will and attesting clause to him. Robert held the light, I think. As I read the will to him, I asked him if he heard me. He said he understood it very well. When I was done reading, I asked him if he understood it. He replied, 'I understand it correctly, and am very well satisfied.' The old man then said, 'I cannot write; you must write my name for me.' I wrote his name, and then got a book, an atlas, I think; we propped him up in bed. I then gave him the pen, and he made his mark. I did not hold or guide the pen for him. As soon as the will was read, I signed my name and my husband's as witnesses at the table, and then went to the bed, and the old man made his mark to the will, and I signed his name afterwards. I don't recollect whether we signed our

names before he did his or not; but am rather of the opinion he signed first. I am pretty certain that he did. I wrote my name and my husband's next. I wrote my husband's name at his request. He can write in German, but not in English. Then McLaughlin told John Mangus to write his name, which Mangus did, and McLaughlin then made his mark. The witnesses signed in nearly the opposite corner of the room from Mr. Turner, on a table. There was nothing between them and Mr. Turner to prevent them seeing him make his mark or to prevent him seeing them sign the will. My husband and Mr. McLaughlin were so situated that they could have seen Mr. Turner sign if they had looked," etc.

Nicholas Mayer testified that he did not see the deceased make his mark.

James McLaughlin testified that he did not see the deceased sign the will. Never talked with him about it in any way. Turner never acknowledged his signature to me. I made my mark, and John Mangus wrote my name for me at my request. I heard the will read over to the old man by Mrs. Mayer. I think the old man heard it. Mrs. Mayer brought the will into the room. Did not hear the old man say anything about the will at any time. The old man was bad sick in bed in the southwest corner of the room. I was near the opposite corner. I thought I was signing my name as a witness to the old man's will. I could have seen the old man sign the will if it had been necessary. I saw him sitting up in bed, etc.

Mrs. Turner says, after the will was read by Mrs. Mayer, she (Mrs. Mayer) got a book and took it to him. She wrote his name, her own name, and her husband's name. John Mangus wrote McLaughlin's name. This is the order in which they were signed.

With reference to the signing, attestation, and subscribing of the will, the court, of its own motion, charged the jury as follows:

"To satisfy the law the testator must, in some manner, communicate to the attesting witnesses, at the time they are

called to sign as witnesses, the information that the instrument then present is of a testamentary character, and that he then recognizes it as his will and intends to give it effect as such. It must be declared to be his last will and testament by some assertion, or some clear assent in words or signs, and the assent or declaration must be unequivocal. It will not suffice that the witnesses have elsewhere, and from other sources, learned that the document which they are called to attest is a will, or that they suspect or infer from the circumstances and occasion that such is the character of the paper; the fact must, in some manner, be declared by the testator, in their presence, that they may not only know the fact, but that they must know it from him, and that he understood at the time of execution and publication, and that he designed to give effect to it as his will."

Our statute requires, in order to the valid execution of a will, that it shall be signed by the testator, or by some one in his presence, with his consent, and attested and subscribed in his presence by two or more witnesses. 2 G. & H. 555, sec. 18.

There is nothing in this statute which requires that the testator shall make known to the subscribing witnesses that the paper which they are to subscribe is a will. This court has decided, in the case of *Brown v. McAlister*, 34 Ind. 375, that no indication of such fact to the subscribing witnesses is necessary. The instructions given to the jury by the court, whatever warrant they may have in the statutes and decisions of the courts of other states, cannot, with reference to our statute of wills and the decisions of this court, be sustained. Nor need the testator see the witnesses subscribe their names to the will. It is enough if it be done in his presence, so that he could see it done if he desired to do so. *McElfresh v. Guard*, 32 Ind. 408. But the witnesses must know that the paper which they subscribe is the one which the testator signed. This is requisite to a legal attestation.

The court told the jury that if the making of the will

which was executed ten years before the one in question, was procured by undue influence, that would be a circumstance that the jury might consider in deciding whether or not the execution of this one was so procured. We think this instruction was not correct. The manner of the execution of that will was not in question. The defendants were not called upon to sustain it. If it was made under undue influence, the making of it would not tend to support this one, on account of the similarity of its provisions. This the court correctly stated to the jury in another charge. But the fact that the former will was procured to be made by undue influence ten years before should not have been submitted to the jury as a circumstance against the will in question.

The court said to the jury, on request of the plaintiff, that before they could find the will in controversy to be the valid will of the testator, they must be satisfied from the evidence that he had a sound and disposing mind, so as to be capable of making a disposition of his property with sense and judgment. An exception was taken to this instruction by the defendant.

This charge should not have been given. In the case of *Moore v. Allen*, 5 Ind. 521, it is decided that in an action to contest the validity of a will which has been admitted to probate, on the ground of the incapacity of the testator, the burden of proof is on the plaintiff, and he has the right to open and close the argument to the jury.

This ruling, doubtless, proceeds on the ground that sanity is presumed, and that, therefore, insanity must be shown by the party alleging it. There are many cases which make a distinction between wills and other instruments, such as deeds, etc., with reference to this rule, holding that as many wills are made by persons in sickness and in advanced age, the party propounding the will must show, in the first instance, that the testator was competent to make the will.

Our statute with reference to the proof of wills before the clerk provides that if it shall appear from the proof taken,

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that the will was duly executed, the testator, at the time of executing the same, competent to devise his property, and not under coercion, such testimony shall be written down, etc., the will recorded, etc. See 2 G. & H. 557, sec. 30. It is best, however, that we adhere to the rule established, and hold that in this case the burden of the issue, as to unsoundness of mind, was on the plaintiff, and that the instruction given was, therefore, erroneous.

The court was requested by the defendants to instruct the jury as follows: "If the witnesses to the will were in such position that they could see, or have seen, the testator make his mark to the will, and all heard the same read before execution, this was a sufficient attestation." The court refused to give this instruction, and to the refusal there was an exception. We think this instruction was correctly refused. How can the subscribing witnesses know that they are placing their names to the same instrument which the testator has signed, unless they see him sign it, or he, in some way, makes known to them the fact that he has signed it?

The judgment is reversed, with costs, and the cause remanded, with directions to the common pleas to grant a new trial.

B. E. Rhoads and M. G. Rhoads, for appellants.

W. Eggleston and N. Harvey, for appellee.

THE STATE, on the Relation of POWELL, Administrator, v.
BIDDLE.

MANDATE.—*Supreme Court.*—*Jurisdiction.*—The Supreme Court has no jurisdiction to award a writ of mandate where said writ is not necessary to the proper discharge of the duties of said court as an appellate court.

DOWNEY, C. J.—Application for a mandate on the following statement of facts: On the 6th day of June, 1869, Jesse

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Hardin recovered judgment for eight hundred dollars, in the common pleas of Cass county, against the Columbus, Chicago, and Indiana Central Railway Company. An execution was issued thereon, and returned no property found. On the 21st day of February, 1871, Hardin commenced a suit in the Cass Circuit Court, against the said company, with a view of having the franchises of the corporation declared forfeited and a receiver appointed.

The railway company then appealed from the judgment of the common pleas, and obtained a supersedeas from this court in that case. Hardin departed this life, and the relator was appointed administrator of his estate.

Hon. Horace P. Biddle, judge of the Cass Circuit Court, on production of the supersedeas and proof that bond had been duly executed, as required in order to make the supersedeas effective, made an order, on motion of the railway company, staying any further proceedings in the case in the circuit court, until the appeal from the judgment of the common pleas shall have been disposed of in this court. We are now asked to issue a writ of mandate, directed to Judge Biddle, commanding him to proceed in the case pending in his court.

Two questions arise: first, has this court jurisdiction to award the writ? and, second, do the facts stated justify its issue?

The only jurisdiction which this court has is that expressly conferred upon it. It is declared in the constitution of the State, that "the Supreme Court shall have jurisdiction, co-extensive with the limits of the State, in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the general assembly may confer." Art. 7, sec. 4.

It is provided by statute, that "writs of mandate and prohibition may issue from the supreme and circuit courts, and courts of common pleas of this State; but such writs shall issue from the Supreme Court only when necessary

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for the exercise of its functions and powers." 2 G. & H. 320, sec. 738. We know of no other statute bearing on this question.

In England an appropriate remedy in such a case was the writ of *procedendo ad judicium*, issued out of the court of chancery, commanding the judges, in the king's name, to proceed to judgment; and if they refused to do so, they were liable to be attached and punished. As the king is there, in theory at least, the source or fountain of justice, and bound to see that the laws are duly administered, the writ appropriately issued out of chancery, and was under the great seal. In this State, the writ of *procedendo* is not provided for, and has never been in use in our practice. The same purpose, however, is accomplished, both here and in England, by the writ of *mandamus* or mandate. But so far as this court is concerned, the power to award the writ is confined, as we have seen, to those cases where it is necessary in the appropriate discharge of its duties as an appellate court; such, for instance, as to compel a judge to sign and seal a bill of exceptions, or to carry out instructions given by the court with reference to further proceedings in a cause remanded by this court, etc.

The case at bar seems to be an independent and original proceeding, not in any way necessary to the proper discharge or exercise of the functions and powers of this court. We are therefore of the opinion that we have no jurisdiction or power to award the writ in this case.

Being of this opinion, we need not examine the question as to the sufficiency of the facts to justify the issuing of the writ.

Petition dismissed.

D. P. Jenkins, for plaintiff.

HUNTER v. LEAVITT and Another.

PROMISSORY NOTE.—Contract.—Defective Manufacture.—Waiver.—Settlement.

Suit on a promissory note. Answer, first, that the consideration of the note was the manufacturing by the plaintiff for the defendant, of fifty fanning mills after a certain pattern mill furnished by the defendant to the plaintiff, the defendant to furnish certain materials, which was done, and to pay ten dollars for each mill, and one hundred dollars and fifty cents was so paid; that the mills were to be constructed in a workmanlike manner, according to the model; that the plaintiff failed to construct the mills in a workmanlike manner and according to model, stating defects; that defendant owned the right to make and sell mills of that model in this State, and expended three hundred dollars in attempting to sell the mills so furnished by the plaintiff, but the imperfect construction destroyed the sale; that he had received on the contract twenty-three mills only, and had contracted for the sale of fourteen thereof, and was ready to return the remaining nine to the plaintiff, as they were worthless; that he has expended four hundred and fifty dollars in materials required to be furnished by him; and that the defective workmanship of the plaintiff had destroyed the sale of all mills of that model; otherwise he could have sold all contracted for and a much larger number at thirty-five dollars each; that the money expended in attempted sales and in material was lost, and the value of the patent destroyed, through the negligence of the plaintiff in the manufacture of the mills; wherefore he demanded judgment for fifteen hundred dollars.

The second paragraph of answer was a general denial, and the third want of consideration. The reply was, first a denial; and in the second paragraph, which was directed to the first and third paragraphs of answer, the plaintiff alleged that the mills were manufactured during the summer and fall of 1867, under the direction of A., the authorized agent of the defendant, who was satisfied with and received the mills, and sold twenty-three of them; and that afterward the defendant, after he had seen and examined them and knew the manner of the manufacture, executed the note in question in settlement of the contract. *Held*, that the second paragraph of reply was sufficient.

INSTRUCTION.—Waiver of Defects.—Agent.—The court, after instructing the jury that the reply was sufficient, proceeded: "If, therefore, you find from the evidence that the mills in question were built under the direction of the defendants's agent, and that said agent knew, or might have known, the character of the workmanship, and the conformity or non-conformity of said mills to the model, and received said mills for his principal, and sold part of them, and that defendant, after having seen and examined said mills, being fully advised as to the manner in which they were made, gave his note for the same, such acts of the principal and agent would be a waiver in law of any objection to the performance of said contract by the plaintiff."

Held, that this instruction was correct.

SAME.—Change of Contract.—The court also charged the jury: "If you believe,

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from the evidence that the defendant, through his agent, contracted with the plaintiff to construct fifty fanning mills, according to a model mill, each supplying part of the materials, and if you further find that said agent, in making said contract, stipulated with plaintiff to make certain changes in said manufactured machines, from the model mill, such acts would be within the scope of the agent's authority and binding upon the defendant; and if you find from the evidence that said agent, in contracting with the plaintiff for the construction of said mills, directed changes to be made from the model mill, the defendant would be concluded by the act of the agent, and liable to pay the contract price, if the plaintiff constructed said mills to correspond with the model, except as to changes made by the direction of the defendant's agent, if such changes were made to conform to the direction of the agent."

Held, that as, under the evidence, the charge, if technically wrong in the abstract, upon which point no opinion is expressed, could not have operated to the injury of the defendant, the judgment could not for such an error be reversed.

EVIDENCE.—Declaration of Agent.—On the trial, the plaintiff was permitted to state, that A., the agent, when he received the machines, declared "that he was satisfied, and that they were a smooth, nice job," evidence having been given of the acceptance by the defendant of the machines and the execution of the note by him afterwards.

Held, that there was sufficient foundation for the admission in evidence of said declaration of the agent.

SAME.—Letter of Agent.—The defendant offered a letter written by A. to him.

Held, that it was not proper evidence, as the agent could not make evidence for his principal; or if not acting as his agent, still he could not bind the plaintiff, no proof being shown that he acted for him.

APPEAL from the Ripley Circuit Court.

WORDEN, J.—Action by the appellees against the appellant upon a promissory note executed by the latter to the former.

The defendant answered in three paragraphs. The third paragraph, stating them in their inverse order, was want of consideration; the second, payment; and the first set up, by way of counter claim, in substance, the following facts: that the consideration of the note was the manufacturing by the plaintiffs, for the defendant, of fifty fanning mills, known as Griswold's patent, to be made after a certain pattern mill furnished by the defendant to the plaintiffs, the defendant to furnish the castings, wire cloth, zinc screens, and sheet iron for the drums therefor, which was done; that the amount to be paid therefor, by the defendant to the plaintiffs, was ten

dollars per mill, or five hundred dollars for the fifty mills; that the defendant paid on the contract one hundred dollars and fifty cents; that the plaintiffs were to construct, in a good and workmanlike manner, said mills, all complete and ready for sale, according to the model mill in every particular, and furnish all the materials except as above stated; that the plaintiffs failed to perform their contract, in this, that the mills were not constructed in a good and workmanlike manner and in accordance with the model mill, setting out specifically the alleged defects; that the defendant owned the right to make, sell, and use said patent fanning mill in the State of Indiana; and that he expended the sum of three hundred dollars in endeavoring to sell the mills constructed by the plaintiffs, in said county of Ripley; but that the defective construction thereof entirely destroyed the sale; that the defendant has received on said contract twenty-three mills only, and that he has sold and contracted for the sale of fourteen thereof, and has now nine of the mills on hand ready to surrender to the plaintiffs, as they are wholly worthless on account of the manner in which they are constructed, as aforesaid; that the defendant has expended four hundred and fifty dollars in purchasing castings, wire cloth, zinc screening, sheet iron for drums, for the construction of mills; and that on account of the defects aforesaid in the construction of the mills, the sale of the same has been entirely stopped, and the defendant cannot sell any mills whatever under his patent, as the imperfections of the mills constructed by the plaintiffs were generally known by the public; that if the mills had been constructed in a good and workmanlike manner, and in accordance with the model, the whole number of fifty mills and a much larger number could have been sold at thirty-five dollars per mill; that on account of the imperfect construction of the mills, the whole amount expended by the defendant in the purchase of material has been lost to him, as he has been compelled to entirely abandon the sale of the mills, for the reason mentioned, and the value of the patent has been entirely de-

stroyed, whereby the defendant has been damaged in the sum of fifteen hundred dollars, for which he demands judgment, and for other relief.

The plaintiffs replied to the entire answer by general denial thereof; and, secondly, to the first and third paragraphs as follows:

"And for further reply to the first and third paragraphs of defendant's answer, plaintiffs say that the mills for which said note was given were manufactured during the summer and fall of 1867, under the direction of one Caleb Amsden, who was then and there the authorized agent of said defendant; that said Amsden, as such agent, was satisfied with and received said mills, and sold twenty-three of them; and that afterward, to wit, on the — day of —, 1868, the said defendant, Hunter, after he had seen and examined said mills, and well knowing the manner in which said mills had been manufactured, executed his said note for the said mills, in settlement of said claim; wherefore," etc.

To this paragraph of the replication the defendant demurred, but the demurrer was overruled, and he excepted.

Trial by jury; verdict and judgment for the plaintiffs; a new trial being denied to defendant, who excepted. Numerous errors are assigned, which need not be noticed in detail, except so far as the points arising under them are urged as ground of reversal. The most important question arising in the record is that presented by the ruling of the court on the demurrer to the second paragraph of the reply set out.

It will be observed that the first paragraph of the answer or counter claim alleges that the defendant only received twenty-three of the mills, but it does not allege that the plaintiffs were anywise in default in respect to the residue of the mills which were to have been manufactured, unless the pleading be open to the inference that the residue were duly constructed according to the agreement, except the defects alleged. This is, perhaps, the fair interpretation of the pleading, and is the most favorable one for the defendant,

inasmuch as otherwise the plaintiffs will not be charged with any default whatever in respect to the residue of the mills.

The reply alleges that the mills for which the note was given were manufactured under the direction of the defendant's agent, who was satisfied with, and received the same, and sold twenty-three of them, etc. This allegation, we think, fairly implies that the plaintiffs made all the mills stipulated for, and the following allegation as to the defendant having examined the mills, and his knowledge of the manner in which they had been made, and his giving the note therefor applies to all the mills, and not merely to the twenty-three which the defendant admits he received.

Do the facts set up in the reply preclude the defendant from objecting that the mills were not such as were stipulated for in the original contract?

We are not called upon to determine whether the mere acceptance of the mills, without objection, would thus preclude him, although he had examined them and knew the manner in which they had been constructed. The authorities upon this point, in this State, are apparently conflicting, and perhaps not easily reconciled. The cases of *Lomax v. Bailey*, 7 Blackf. 599; *Epperly v. Bailey*, 3 Ind. 72; *McKinney v. Springer*, 3 Ind. 59; and *Coe v. Smith*, 4 Ind. 79, cited by counsel for the appellant, go far toward establishing the doctrine that such acceptance would not preclude the defendant from setting up, by way of counter claim or otherwise, that the mills were not such as were contracted for. Perhaps there are other cases running through our reports falling within the general doctrine of those cases.

On the other hand, the cases of *Ricketts v. Hays*, 13 Ind. 181, and *McAroy v. Wright*, 25 Ind. 22, hold the contrary doctrine. See also the cases of *Everett v. Gray*, 1 Mass. 101, and *Wilkins v. Stevens*, 8 Vt. 214. We need not, in this opinion, adopt either line of the authorities to the exclusion of the other, or draw distinctions between the cases with a view to reconciling them.

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There is another element entering into the transaction besides the acceptance of the mills by the agent of the defendant, which is, that some considerable time after the mills had been thus accepted, and after the defendant had seen and examined the mills, and well knowing the manner in which they had been constructed, he executed the note in settlement of the plaintiffs' claim therefor.

We think the facts alleged in the replication, taken altogether, show an acceptance by the defendant of the mills in full discharge of the plaintiffs' contract, and that any defects in mills were waived. The giving of the note in settlement of the claims, especially as the defendant had seen and examined the mills, and was apprised of the manner in which they had been constructed, was a clear waiver of any defect in them. *Swank v. Nichols' Adm'r*, 20 Ind. 198; same case, 24 Ind. 199; *The Evansville, etc., Railroad Co. v. Dunn*, 17 Ind. 603; *Brooker v. Hetzelgesser*, 35 Ind. 537. There is no fraud or deceit charged against the plaintiffs; and on the facts set up in the reply, we think it clear that the defendant has no ground of defense or counter claim, by reason of anything alleged in the first paragraph of his answer. The reply also shows a valuable consideration for the note, and hence, is sufficient replication to the third paragraph of the answer as well as the first.

There was no error in the ruling of the court on the demurrer to the reply in question.

The court, in its fifth charge to the jury, after stating the substance of the replication above set out, and that the court had held it to be good, proceeds as follows: "If, therefore, you find from the evidence that the mills in question were built under the direction of the defendant's agent, and that said agent knew, or might have known, the character of the workmanship, and the conformity or non-conformity of said mills to the model, and received said mills for his principal, and sold a part of them; and that the defendant, after having seen and examined said mills, being fully advised as to the manner in which they were made, gave his note

for the same, such acts of the principal and agent would be a waiver in law of any objection to the performance of said contract by the plaintiffs."

If we are right in the conclusion at which we have arrived, in respect to the validity of the replication, it follows that no error was committed in giving the charge in question.

The appellant excepted to the fourth charge of the court, which is as follows, viz.: "If you believe, from the evidence, that the defendant, Hunter, through Amsden, his agent, contracted with the plaintiffs to construct fifty fanning mills according to a model mill, each supplying a part of the materials, and, if you further find that said agent in making said contract, stipulated with plaintiffs to make certain changes in said manufactured machines from the model mill, such acts would be within the scope of the agent's authority, and binding upon Mr. Hunter; and if you find from the evidence that said agent, in contracting with the plaintiffs for the construction of said mills, directed changes to be made from the model mill, Hunter would be concluded by such act of his agent, and liable to pay the contract price, if the plaintiffs constructed said mills to correspond with the model, except as to changes made by the direction of the defendant's agent, if such changes are made to conform to the directions of the agent."

There is some conflict in the evidence in respect to the question whether Amsden was authorized by the defendant, in making the contract with the plaintiffs for the construction of the mills, to contract for the departure from the model furnished. The charge in question, if too broad as an abstract proposition, a point which we do not decide, was, as applied to the case, productive of no harm to the defendant. The evidence shows that after the defendant had received, and seen, and examined some of the mills, and knew the manner in which they had been constructed, he retained those that he had received, and gave the note in suit for what was due, as we infer, for the entire fifty mills. This was an adoption of the contract of his agent, whether

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the agent had previously the authority to make it or not. Where there is a ratification of a part of the acts of the agent, it operates as a confirmation of the whole of that particular transaction of the agent. Story on Agency, section 250. Such adoptive authority relates back to the time of the original transaction, and is deemed in law the same, to all purposes, as if it had been given before. Dunlap's Paley, p. 171, note *o*; also, p. 324, note 1.

As, under the facts of this case, the charge given, if technically wrong in the abstract, could not have operated to the injury of the defendant, we cannot reverse the judgment on account of the charge, as a harmless error is no ground for reversal.

On the trial, Leavitt was permitted to testify that Amsden said, at the time he received the machines, "that he was satisfied, and that they were a smooth, nice job." This testimony was objected to, without showing an agency for the purpose of examining, inspecting, and receiving the mills, but the objection was overruled, and the defendant excepted. Without stopping to inquire whether the original authority conferred upon Amsden to make the contract for the construction of the mills did not authorize him to accept and receive them when constructed, we think the evidence already then before the jury obviated the objection to the testimony. The defendant had already testified as follows, among other things:

"I received twenty-three mills on this contract. I disposed of nineteen or twenty mills."

These mills, thus received by the defendant, seem to be the same mills that Amsden was satisfied with, and which he thought to be a nice, smooth job. Thus the defendant adopted and ratified the acceptance of the mills by Amsden, and this was equivalent to an original authority to accept and receive them.

The defendant, on the trial of the cause, offered in evidence a letter written by Amsden to himself. The letter was dated at the "office of R. Leavitt, Vernon, Indiana, July

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26th, 1867," but it does not appear that the plaintiffs dictated the letter or were apprised of the contents thereof. If Amsden be regarded as the agent of the defendant, he could not, by a letter to his principal, make evidence for him; and if he be not regarded as such agent, his letter can be but the statement of a third party, which could in no way bind the plaintiffs. The letter was properly excluded.

We have thus examined all the grounds relied upon for a reversal of the judgment, and find no sufficient cause for reversal.

The judgment below is affirmed, with three per cent. damages and costs.

E. P. Ferris and H. T. Lipperd, for appellant.

R. M. Goodwin, W. D. Ward, and J. O. Crawens, for appellees.

GOLDTHWAIT and Another v. BRADFORD and Another.

PROMISSORY NOTE.—Contract.—Set-off.—When a promissory note negotiable under the statute is executed, and subsequently the payee of the note makes a written agreement that he will accept as payment upon the note any legal claims against him that the person who has executed the note may obtain, such agreement does not in any manner change the rights of the parties.

SAME.—Assignment.—After notice to the payor of an assignment of the note to a third party, he cannot by subsequent purchase of claims against the original payee of the note entitle himself to a set-off against the holder.

SAME.—Parties.—Estoppel.—In a suit against the payee of a note to have the same declared paid, the complaint recited that the defendant "claimed that he had sold and assigned the said note and mortgage to" a third party, "whom plaintiff makes defendant hereto;" and said third party filed an answer, to which plaintiff demurred, without moving to strike out the answer.

Held, that plaintiff was estopped from denying that the person so answering was a proper party defendant.

APPEAL from the Grant Common Pleas.

BUSKIRK, J.—The facts in this cause are substantially as follows: Bradford and Brownlee, who were the plaintiffs below, executed to Oliver Goldthwait, one of the appellants, their promissory note for one hundred and eighty-three dollars and twelve cents, to secure which Bradford and wife executed a mortgage to Oliver Goldthwait upon certain real estate named in the mortgage. On the day and after the note was made, Oliver Goldthwait gave to the appellees a written permission, or license, or agreement, that they might purchase any legal claims against him, said Oliver, and which, when so purchased, should be set off against the note as payments to the amount they legally represented. Under this state of facts the plaintiffs purchased several claims against Oliver Goldthwait, and on the 28th day of September, 1862, a settlement was had between the parties, and the amount of such claims was credited on the note, in the handwriting of Bradford. On the 30th of September, 1862, two days afterward, Oliver Goldthwait sold and assigned the note to Simon Goldthwait for a valuable consideration and without notice to Simon Goldthwait of the agreement made by Oliver that appellees might purchase and set off claims against the note. Notice of this assignment was given to the appellees on the first day of October, the day after the sale and transfer to Simon Goldthwait of the note. Subsequent to this sale, assignment, and notice, the appellees purchased the claims against Oliver Goldthwait, the payee of the note, in amount, as is claimed, sufficient to set off or pay the whole sum due on the note. This action was prosecuted by the appellees to procure the surrender and cancellation of the note and mortgage.

The complaint avers the fact of making the note and mortgage and the execution of the license or agreement in writing by Oliver Goldthwait before referred to, and that appellees had, in accordance with said agreement, purchased claims on said Oliver to an amount equal to the sum due on the note; wherefore they claim that the note has been paid, and pray judgment accordingly.

To this complaint the appellants answered jointly, first, the general denial; and, secondly, that the note and mortgage were executed to Oliver Goldthwait, and that he, said Oliver, on the 30th day of September, 1862, for a valuable consideration, sold and assigned the same to his co-defendant, Simon Goldthwait, who, at the time, and for a long time afterward, had no notice whatever of any license or agreement, by said Oliver, that said appellees might purchase claims against said Oliver in payment of said note. The answer avers that the appellees had due notice of said sale and transfer of the note before any claims were by them purchased, as in complaint specified.

Simon Goldthwait also answered separately; first, general denial of the complaint; secondly, that said Oliver was the owner of the note and mortgage named in the complaint, and that after the execution of the note and mortgage, said Oliver, on the 30th day of September, 1862, sold and assigned the same to him, for a valuable consideration; of which sale and assignment said appellees had due notice on the first day of October, 1862, one day after the assignment; that when said notice was so given to appellees, they had not, nor had either of them, purchased any claim or claims against said Oliver Goldthwait; that when he so purchased said note of said Oliver, he had not any notice or information that said Oliver had made any agreement with plaintiffs that they, or either of them, might purchase claims against said Oliver to set off against said note. Nor had he any such notice for a long time afterward.

The answer further avers that the note and mortgage are due and unpaid, copies of each being filed, and prays judgment against Bradford and Brownlee for the amount due on the note, and decree of foreclosure against Bradford, and for other relief, etc.

The third answer of Simon Goldthwait avers that the note in complaint now is, and has been ever since the 30th day of September, 1862, his property, by sale and assignment, of which the appellees had due notice on the first day

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of October, 1862; that he paid for the note a valuable consideration, and without any notice whatever of any contract or agreement of said Oliver that the appellees might purchase claims against said Oliver to pay or set off the same, and demands judgment for costs, etc.

The fourth paragraph of Simon Goldthwait's separate answer alleges that said appellees and said Oliver Goldthwait, on the 28th day of September, 1862, had a full settlement of all claims which the appellees had at that time purchased against said Oliver, and that the amount jointly (sixty-two dollars and sixty-seven cents) was duly credited on said note by said Bradford; and that on the 30th day of September, 1862, he (defendant) purchased the note without notice, etc., of any agreement, as stated in the former answer; and that appellees had due notice of the sale and assignment October 1st, 1862, at which time they had not purchased any claims against said Oliver Goldthwait; wherefore, etc.

To all these answers, except the first paragraphs, the appellees demurred "for cause that neither of said paragraphs contains facts sufficient to constitute a cause of action."

This demurrer the court sustained; to which the defendants excepted at the time, and refused to amend their answer or to answer further, when the court found against the defendants.

The appellants moved the court for a new trial, and filed the causes: that the court erred in sustaining the demurrer to the answers of the defendants and to all of them; that the finding was contrary to law; that the finding was not sustained by sufficient evidence.

The court overruled the motion; to which defendants excepted, and filed their motion in arrest of judgment, that the court erred in sustaining the demurrer to the defendants' answers, and all of them; which motion was overruled and an exception taken.

The court found for the plaintiffs without any evidence in the cause. The court then pronounced judgment against

the appellants, that said note and mortgage be declared fully paid and cancelled, etc., and that defendants pay the costs. Appeal prayed and granted.

The errors assigned in this case are as follows:

1. The court erred in sustaining the demurrer to the joint answer of defendants.
2. The court erred in sustaining the demurrer to the separate answer of Simon Goldthwait.
3. The court erred in finding for the plaintiffs over a general issue without any evidence.
4. The court erred in overruling motion for a new trial.
5. The court erred in overruling motion in arrest of judgment.

The only available errors are the first and second. The record shows that after the court sustained demurrers to the joint and separate answers of the defendants, they refused further to amend and withdrew the general denial. The court thereupon, very properly, rendered judgment for the plaintiffs. The complaint was then unanswered. The court was bound to regard the allegations of the complaint as confessed, and act upon them as true. Where a judgment is rendered for a plaintiff on demurrer to answers, upon refusal to plead further, the plaintiff is not required to offer any evidence. *Giles v. Gullion*, 13 Ind. 487. Consequently, no motion for a new trial is necessary. A defendant by refusing to amend an answer to which a demurrer has been sustained, agrees to stand upon the ruling of the court upon the demurrer. It is a virtual admission that he has no case in court, if the ruling of the court was correct. A defendant might, after he had permitted judgment to go on sustaining a demurrer to his answer, move in arrest of judgment on the ground that the court had no jurisdiction of the subject-matter of the action, but a motion in arrest of judgment, for the reason that the court had erred in sustaining the demurrer to the answer, amounts to nothing. The question had been properly reserved by an exception to the ruling of the court on the demurrer.

The appellants demurred to the complaint; the demurrer was overruled, and an exception was taken; but this ruling has not been assigned for error, and we cannot therefore decide anything as to the sufficiency of the complaint.

The joint answer of the defendants was in two paragraphs. The first was a denial. The only material allegation in the second paragraph was, that Oliver had sold and transferred the note and mortgage mentioned in the complaint to Simon, and that Simon had purchased them without notice of the agreement, for a valuable consideration, and was, therefore, the *bona fide* owner and holder of the note and mortgage. So far as Oliver was concerned, this answer only amounted to a disclaimer of any interest in the suit. The sustaining of the demurrer to this answer worked no injury to him, nor did it to Simon, for the reason that the same matters are alleged in his separate answer.

This leaves for our decision the correctness of the ruling of the court in sustaining the demurrer to the separate answer of Simon Goldthwait. But before we can reach the decision of that question, we have to decide a preliminary one presented by the appellees. It is contended by them that the court committed no error in sustaining the demurrer to the separate answer of Simon Goldthwait, for the reason that he was not a party to the record. If this objection is well taken, it is decisive of the case, and must result in an affirmance of the judgment. The record in this cause is very much confused and mixed up. We are not surprised at this, when we take into consideration the many changes that occurred in the parties and pleadings, and the fact that this cause was actually pending in the court below for five years. This action was originally commenced by Moses Bradford against Oliver Goldthwait. The defendant demurred to the complaint, for the reason that James Brownlee was not made a plaintiff, but the demurrer was overruled, and the cause was continued. At a subsequent term an amended complaint was filed, and James Brownlee was added as a plaintiff. This complaint proceeds against Oliver alone,

until near the close, when it is alleged, "that Oliver claimed that he had sold and assigned the said note and mortgage to Simon, who plaintiffs make defendant hereto." At a subsequent term of the court, John Brownlee, who was and is of counsel for the appellees, filed an affidavit for a continuance of the cause, in which it is stated that Simon was a defendant, and that he and the plaintiffs had been making an effort to compromise the case, and that by reason of such effort at adjustment, the plaintiffs were not ready for trial, and the cause was continued. At a subsequent term of the court, Simon filed his separate answer, in which he states that he had been made a defendant by the order of the court. The plaintiffs, instead of moving to strike out his answer, as would have been the proper practice, if he was not a party to the record, demurred to it, and thus treated him as a party defendant. We think that it is quite clear that the appellees are estopped from saying that he is not a proper party defendant.

This brings us to the consideration of the main question in the case, and that is, whether the ruling of the court was correct in sustaining demurrers to the answer of the defendant, Simon Goldthwait. The second paragraph of the answer is in the nature of a cross complaint, and alleges, in substance, that he became the owner, by purchase and assignment, of the note and mortgage mentioned in the complaint, on the 30th day of September, 1862; that he purchased the same for a valuable consideration, and without notice of the agreement that had been entered into as to the purchase of claims against the payee of the note; that he notified the makers of the note on the first day of October, 1862, that he had purchased the note and mortgage; that the plaintiffs had purchased the claims against Oliver Goldthwait that they were seeking to have entered as a credit upon the said note, after they had received notice that he had purchased the same; that the said note, except the credits indorsed thereon before the same was assigned to him, remained due and unpaid. The prayer of the cross complaint was that he

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should have judgment against the makers, and a foreclosure against Bradford and wife.

The third was the same in substance as the second, except that it was pleaded in bar of the action, and no affirmative relief was demanded.

The fourth paragraph alleges that the makers and payee of the note had made a settlement on the 28th day of September, 1862, of all claims which the makers had purchased against the payee, and that a credit therefor had been entered on the said note; that he had, on the next day, purchased the said note for a valuable consideration, and without notice of the agreement set out and relied upon in the complaint; and that he had notified the makers on the first day of October, 1862 that he had purchased the said note; and that from that time he had been the *bona fide* owner and absolute holder of such note and mortgage.

The validity of the above answers is to be viewed in two aspects; first, as they are affected by the agreement; and secondly, without the agreement.

What was the legal effect of the agreement? The plaintiffs, on the 11th day of January, 1862, by their note of that date, unconditionally agreed to pay Oliver Goldthwait, twelve months after date, the sum of one hundred and eighty-three dollars and twelve cents. This note was delivered to the payee. On the same day, the payee executed and delivered to the makers the following instrument, namely:

"I have had this day executed to me a note by James Brownlee and Moses Bradford for one hundred and eighty-three dollars and twelve cents, which I agree to receive as credit on said note any legal claims against me that they may obtain. January 11th, 1862. O. GOLDTHWAIT."

This agreement was written on a separate piece of paper from the note. It was in no manner attached to the note, nor did the note make any reference to it. It was executed on the same day that the note was, and we infer from the language of the agreement that it was subsequent to the execution of the note. There is no consideration mentioned

in the agreement, nor is it alleged that the execution of the note in any manner depended upon the execution of the agreement. It seems to stand without any consideration to support it. But suppose that it was executed at the same time that the note was, and that it was supported by a consideration, the question still recurs, what was its legal effect? Did it confer upon the plaintiffs any right that they did not possess without it? In what manner did it affect the legal rights and obligations of the parties? It gave to the plaintiffs the consent of the payee of the note to do just what they had the undoubted and undisputed right to do under the well settled principles of law, either with or without his consent. Suppose this agreement had been incorporated into the note, or that the agreement had been attached to the note, and that Simon Goldthwait had seen it before he took the assignment, would the legal rights of the parties have been different? But it is claimed that it would have been notice to the purchaser. We concede that it would have been notice, but notice of what? It would have been the same notice that the law gives, and that is, that the maker of a promissory note, not governed by the law merchant, has the right to purchase claims against the payee of such note, before he has received notice of the assignment of the note, and that such claims will constitute a valid set-off against the note, whether the suit was brought by the original payee or the assignee of the payee. But the agreement not being written on or attached to the note, but being in the possession of the makers of the note, it would not be notice to any person unless he had received actual notice of its existence and contents. We are clearly of the opinion that the agreement was invalid for the want of a consideration; and that if it was valid, it would not change, alter, or in any manner affect the legal rights and obligations of the parties.

The question as to what were the rights of the plaintiffs under the law, remains to be considered. Our statute authorizes the sale, assignment, and transfer of promissory

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notes, and it gives to the maker of a note the same defense against an assignee that he would have against the assignor or the original payee. Section 3 of an act concerning promissory notes, etc., (2 G. & H. 658) provides, that "whatever defense or set-off the maker of any such instrument had, before notice of assignment against an assignor, or against the original payee, he shall have also against their assignees."

Now suppose that Oliver Goldthwait, the original payee of the note, had, upon its maturity, brought suit thereon against the makers, what would have been their right of set-off? They could have pleaded as a set-off any note or claim against the payee that they had acquired prior to the commencement of the action, and which was due at or before the time when offered in evidence as a set-off.

Section 57, 2 G. & H. 88, provides that "the set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of a debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off."

When the action is brought by the original payee, no set-off can be allowed, unless the maker had acquired it before the commencement of the action; but when the action is brought by the assignee, no set-off, as against the assignor, can be allowed, unless it had been acquired by the defendant at the time of, or before notice of, the assignment. *Shannon v. Wilson*, 19 Ind. 112.

The latter part of section 6, 2 G. & H. 40, reads: "And all actions by assignees shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment."

The word "existing" has given rise to some doubt as to the true construction of the above section. The above clause was copied from the New York code. It has been held in that State that when an action is brought by an assignee of a chose in action not negotiable, and the defendant seeks to

set off a claim in his own favor against the assignor, he must prove that the claim belonged to him before notice of the assignment. *Soloman v. Holt*, 3 E. D. Smith, 139; *Beckwith v. The Union Bank*, 5 Seld. 211. The same construction has been placed upon this clause by this court. *Haugh v. Scabold*, 15 Ind. 343; *Sayres v. Linkhart*, 25 Ind. 145; *King v. Conn*, 25 Ind. 425.

We think this is the true construction. The answer avers that all the claims purchased by the makers against the payee, except such as had been credited on the note on the 28th of September, 1862, had been purchased after the plaintiffs had been notified that the note had been assigned, and was held and claimed by the said Simon Goldthwait. Such claims could not be pleaded as a set-off against the assignee.

We think that the cross complaint and the third and fourth paragraphs of the separate answer of Simon Goldthwait were good. The matters alleged in the cross complaint entitled him to the relief demanded. The matters pleaded in the second and third paragraphs of the answer were a complete defense to the action. The court erred in sustaining the demurrer to the cross complaint and the third and fourth paragraphs of answer, for which errors the cause must be reversed.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to overrule the demurrer to the cross complaint and answers of Simon Goldthwait, and for further proceedings in accordance with this opinion.

A. Steele and R. T. St. John, for appellants.

J. Brownlee and H. Brownlee, for appellees.

 Davis and Wife v. Davis and Others.

DAVIS and Wife v. DAVIS and Others.

36	160
130	547
38	160
140	226
86	160
153	108

APPEAL.—*Partition*.—In a proceeding for the partition of lands, the interlocutory decree for partition and appointment of commissioners does not constitute a final judgment; and no appeal can be taken to the Supreme Court in such proceeding till the coming in of the report of the commissioners and the judgment of the court thereon.

JURISDICTION.—*Supreme Court*.—Jurisdiction cannot be conferred upon the Supreme Court by consent; nor can this court by taking and exercising jurisdiction in a cause where the right of appeal does not exist, acquire jurisdiction so as to give the force and effect of a decision to its ruling.

APPEAL from the Madison Circuit Court.

BUSKIRK, J.—This was a proceeding instituted by the appellants against the appellees to obtain the partition of the real estate described in the petition. There was an answer filed to the petition, and a cross complaint was filed by Ann Davis, to which there was an answer. The case was, by the agreement of the parties, submitted to the court for trial. The court rendered a special finding of facts and his conclusions of law thereon. There was no exception to the decision of the court. A motion for a new trial was made, overruled, and an exception taken. The court then rendered an interlocutory order of partition, and appointed commissioners to make partition, and directed them to report at the next term. From this order the appellants appealed to this court. An appeal can only be taken to this court from a final judgment. *Miller v. The State*, 8 Ind. 325; *Reese v. The State*, 8 Ind. 416; *Bradley v. Bearss*, 4 Ind. 186; *Shroyer v. Lawrence*, 9 Ind. 322; *Reese v. Beck*, 9 Ind. 238; *Pigg v. The State*, 9 Ind. 363; *Cole v. Peniwell*, 5 Blackf. 175; *Fuller v. Adams*, 12 Ind. 559; *Staley v. Dorset*, 11 Ind. 367; *Love v. Mikals*, 12 Ind. 439; *Crews v. Cleghorn*, 13 Ind. 438; *House v. Wright*, 22 Ind. 383.

In proceedings for the partition of lands, the interlocutory decree for partition and appointment of commissioners does not constitute a final judgment; and no appeal can be taken to this court till the coming in of the report of the commis-

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sioners and the judgment of the court thereon. *Clester v. Gibson*, 15 Ind. 10; *Griffin v. Griffin*, 10 Ind. 170; *Cook v. Knickerbocker*, 11 Ind. 230; *Wood v. Wilkinson*, 13 Ind. 352.

There was no final judgment in the case under consideration, and consequently no appeal could be taken. Jurisdiction cannot be conferred on this court by consent. Nor can this court, by taking and exercising jurisdiction in a cause where the right of appeal does not exist, acquire jurisdiction so as to give the force and effect of a decision to its ruling. Its decision would be merely an *obiter dictum*.

This appeal is dismissed, at the costs of the appellants, and the cause is remanded, with directions to the court below to receive the report of the commissioners, or if any of those appointed cannot act, to appoint others, and for further proceedings not inconsistent with this opinion.

M. S. Robinson, for appellants.

W. R. Pierse and *H. D. Thompson*, for appellees.

LINCOLN and Others v. THE STATE, on the Relation of WOOD and Others.

36	161
157	887

TURNPIKE.—*Organization of.*—Gravel road companies are organized under the act of May 12th, 1852, 1 G. & H. 474. The act of 1867 on the same subject was an amendment of the former law, and was repealed by the act of 1869, reserving, however, certain rights.

SAME.—*Vote.*—All persons who acquiesce in assessments and become thus liable to pay towards the construction of the road, are entitled equally with subscribers to vote, one vote for each portion of the amount assessed equal to a share of stock; nor is the payment of the assessment necessary to entitle the person assessed to vote.

SAME.—*Appeal.*—The party who appeals from an assessment cannot vote pending such appeal.

APPEAL from the Warren Circuit Court.

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Lincoln and Others *v.* The State, *ex rel.* Wood and Others.

DOWNEY, C. J.—This was a proceeding by *quo warranto*, by the appellees against the appellants. The appellants were subscribers to the stock of the "West Lebanon and Walnut Grove Gravel Road Company," and were duly elected the first directors of said company. They applied, under the act of 1867, for the appointment of commissioners to assess the benefits to the lands along the road, and at the termini thereof. The commissioners were appointed and made the assessment under that act, but did not report their assessment until the 24th day of May, 1869. Nineteen of the persons assessed appealed from the assessment to the circuit court.

While these appeals were pending, to wit, on the 25th of February, 1870, an election was held, pursuant to legal notice, for the election of a new board of directors. At this election those persons who had been assessed, including those who had appealed from the assessment, claimed the right to vote equally with those who were the original subscribers to the stock. This right being denied them, they, with five of the subscribers, withdrew, and, at a point about sixty feet from the place at which the election was to be held, according to the notice given, they held an election, at which the appellees were elected directors, while the appellants were elected by the subscribers, except the five above mentioned, at the place named in the notice.

The second paragraph of the answer set up the facts specially, as above, and on demurrer thereto it was held insufficient.

The only error assigned is the sustaining of this demurrer.

Two questions are presented by this assignment: first, were the persons who had been assessed entitled to vote for directors? second, were the nineteen who had appealed from the assessment authorized to vote, notwithstanding their appeals?

The act of 1869 provides, that "any and all persons having been assessed, shall have all the rights and privileges of any other person who has subscribed a like amount, and all per-

sons having paid such assessment or any part thereof, shall thereby become entitled to a certificate of stock for the same, and have all the rights and privileges of any other person who has paid a like amount on subscription." 3 Ind. Stat. 540, sec. 6.

The articles of association of this company fix the amount of stock and provide that the shares shall be twenty-five dollars each. In the act establishing general provisions respecting corporations, 1 G. & H. 268, sec. 2, it is provided, that "each stockholder shall have one vote for each share owned and held by him, for ten days previous to the meeting of the corporation."

It is not essential, under the act authorizing the construction of plank, macadamized, and gravel roads, 1 G. & H. 474, that the subscriber should have paid for his shares to entitle him to vote. Section 11 of that act shows that such payment was not contemplated as an act necessary to give the right to vote, as the directors are authorized to require payment at such times, and in such proportions, and on such conditions as they shall see fit, under the penalty of forfeiture of the stock, and of all previous payments thereon, or under such other penalty as the company may, by law, prescribe.

It is not shown that the subscribers had paid for their stock, either those by whom the defendants were elected or the five of them who acted with the parties assessed, in the election of the relators. But as the act of 1852 contemplates a credit for the amount subscribed, and allows it to be paid as the directors may order, we think the subscribers were entitled to vote for directors without payment for their shares. It was the act of subscribing which made them stockholders, and certificates of stock were not necessary to vest the right to the stock, or to entitle them to vote. *Beckett v. Houston*, 32 Ind. 393; *The New Albany, etc., Railroad Co. v. McCormick*, 10 Ind. 499.

As the subscribers have the right to vote without payment of the amounts by them subscribed, we see no injustice or

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inequality in holding that parties who have been assessed, and who acquiesce in the assessment, and become liable in this way to pay toward the construction of the road, should also have the right to vote. As their money, equally with that of the subscribers, is to be expended, it seems reasonable that they should have a voice in the selection of the board of directors who are to expend it. As the shares are twenty-five dollars, of course the amount of the assessment, as well as the amount of the subscription, must be large enough to entitle the party to vote. For each sum of twenty-five dollars, each party so assessed has a right to one vote.

It is contended by counsel for the appellants that the company could not be affected by the act of 1869, as it had organized while the act of 1867 was in force, and had commenced operations under that act, unless it accepted the act of 1869 as an amendment of the law under which it was created; and that as the act of 1867 did not allow one to vote who had been assessed until he had paid the assessment, the parties who had been assessed in this case, and had not paid, were not legally entitled to vote. We cannot sustain this view of the law. These companies are all organized under the general law of May 12th, 1852, entitled "an act authorizing the construction of plank, macadamized, and gravel roads." 1 G. & H. 474. The act of 1867 was enacted as an amendment of the act of 1852. The act of 1869 repeals the act of 1867, reserving certain rights. The power to amend is expressly reserved in section 24 of the act of 1852.

The next question relates to the right to vote of the nineteen persons who had appealed from the assessment to the circuit court. What effect did the pendency of the appeal have upon that right? We are of the opinion that the appeal, when the same has been perfected, suspends the right of the company to collect the assessment; and if it suspends the right of the company under the assessment, it should also suspend the right of the party assessed to claim

and exercise the rights growing out of a valid and subsisting assessment. It seems to us to be inconsistent for a party to appeal from an assessment, and thus controvert the correctness thereof, and at the same time to exercise the right of voting for directors, which supposes the existence and rightfulness of the assessment.

We had occasion to consider the effect of an appeal from the board of commissioners in a case under the law relating to the granting of licenses to vend liquors, in the case of *Young v. The State*, 34 Ind. 46, and came to the conclusion that such appeal suspended the right of the party to proceed under the judgment from which the appeal was taken. If the appeal suspends the right as to one of the parties, it should have the same effect as to the other. A party should not be allowed to appeal from a judgment or an assessment, and at the same time proceed as if the judgment or assessment were uncontroverted.

It is conceded that if the nineteen persons who had appealed were not competent to vote, then the appellants, and not the appellees, were elected directors of the company. We hold that they were not qualified voters, and that for this reason the judgment of the circuit court, in sustaining the demurrer to the second paragraph of the answer, was erroneous.

The judgment is reversed, with costs, and the cause remanded, with directions to overrule the demurrer, and to proceed according to this opinion.

B. F. Gregory, J. Harper, H. W. Chase, J. A. Wilstach, and Wallace & Hiatt, for appellants.

J. Buchanan, A. A. Rice, and J. M. Butler, for appellees.

 Milliken and Others v. Ham.

MILLIKEN and Others v. HAM.

36	166
185	676

RESULTING TRUST.—Mortgage.—Merger.—Where a third party pays the purchase-money to the grantor for the grantee of lands at the time of the conveyance, upon a parol agreement, without fraudulent intent, with the grantee, that the grantee shall hold the land in trust, as security for the repayment of such money to such third party, a resulting trust arises in favor of such third party and against the assignee of a judgment who is the purchaser of said land at sheriff's sale on execution issued upon said judgment rendered against said grantee prior to the said conveyance and payment of money, and who before the assignment of the judgment had full knowledge of said agreement and payment of money. But if, after said payment by said third party and the agreement between him and the grantee, said third party receives the note of the grantee, and a mortgage on said land, as security for the purchase-money so paid by said third party, he thereby converts the equitable estate he held in the land, not into an express trust, but into a mere debt secured by mortgage, and subject to the lien of the prior judgment.

MORTGAGE.—Delivery.—A mortgage takes effect from the time of its delivery.

NEW TRIAL.—Motion to Strike Out.—Bill of Exceptions.—Error of the court in ruling on a motion to strike out is not a reason assignable for a new trial, and can only be reserved by bill of exceptions; a new trial is only a judicial re-examination of the issues of fact, and not of questions presented in arriving at the issues, whether those questions were raised by demurrer to a pleading, or by a motion to strike out.

APPEAL from the Howard Common Pleas.

DOWNEY, C. J.—This action was brought by Ham to foreclose a mortgage on certain real estate, executed by Welch and wife, to secure the payment of a note given by Welch to Ham. Milliken was made a defendant because he claimed to have purchased the real estate at a sheriff's sale on an execution issued upon a judgment against Welch, of a date prior to that of Ham's mortgage.

The complaint, as finally amended, states that Welch and wife executed the mortgage to Ham on the 26th day of January, 1864, to secure the payment of the note of Welch for two hundred and fifty dollars, at eleven months, and avers that the note and mortgage were given to secure that amount of the purchase-money of said real estate mentioned in the mortgage, advanced by the plaintiff upon the purchase of said real estate of one Polson, which sum went, to that ex-

tent, to pay said Polson, and was, in fact, paid by the plaintiff to Polson for said land, on a conveyance thereof by Polson to Welch; and at the time said conveyance was made to and in the name of said Welch by the said Polson, it was agreed by parol between the said plaintiff and Welch, and without any fraudulent intent, that the said Welch was to hold the said land and an interest therein sufficient to cover the amount of money so advanced by the plaintiff, in trust, for the plaintiff so paying said part of the purchase-money, to the extent of the purchase-money so paid; and a short time thereafter, to wit, at the time of the execution of the note and mortgage, the implied and resulting trust was converted into an express trust by the said mortgage given by said Welch and Wife to the plaintiff, and accepted and received by the plaintiff as such; that the said mortgage was duly recorded in the recorder's office of Howard county, Indiana, on the 14th day of November, 1864; that on the 5th day of January, 1857, one John H. Young, recovered a judgment against Welch in the Howard Circuit Court for three hundred and ninety-two dollars and thirty-seven cents; that Welch paid on the judgment, on the 17th of December, 1858, two hundred and fourteen dollars and fifty-six cents; and on the 5th of January, 1865, Young assigned the judgment to Milliken, who caused an execution to be issued thereon, levied upon the said mortgaged premises, and the same were sold by the sheriff and purchased by, and conveyed to, said Milliken; that at the time Milliken purchased the judgment, and took the assignment thereof, and at the time he so purchased said real estate at sheriff's sale, he had full knowledge of the fact of the existence of said note and mortgage, and of the resulting trust merged in said mortgage, and that the same were unpaid, and knew that the same were given to secure two hundred and fifty dollars of the purchase-money of said land, advanced by the plaintiff upon the purchase of said land by Welch of Polson, and knew that said sum of money so secured by said mortgage, and so advanced by the plaintiff, went to that extent to pay

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the said Polson for said land on a sale and conveyance thereof by said Polson to said Welch, and that said note and mortgage were given to secure part of the purchase-money for said land; but the said Milliken, well knowing all of the aforesaid facts at the time of his purchase of the aforesaid judgment and land, did in fact purchase said judgment and land with the view, and intent, and purpose of defrauding the plaintiff out of his said debt so secured by said note and mortgage; wherefore the plaintiff asks judgment against Welch for five hundred dollars, and the foreclosure of the mortgage, etc., and that out of the proceeds the plaintiff be first paid his debt and interest, and that the residue be paid to Milliken; that said Milliken be postponed and decreed to hold subject to the said mortgage so due to the plaintiff, etc.

Milliken demurred separately to the complaint for the reasons:

1. There is a defect of parties defendants, in this, that said Milliken is improperly joined.
2. That the court has no jurisdiction, etc.
3. That several causes of action have been improperly joined, etc.
4. That so much of the complaint as relates to him does not state facts sufficient, etc.
5. That the complaint does not state facts sufficient, etc.

This demurrer was overruled by the court and the defendant excepted.

Milliken then answered: first, that Welch executed the note and mortgage, but not on the day therein specified. He denies that the note and mortgage were given for purchase-money, or that they constitute a lien paramount to his title.

Second, for further answer he admits that on the 26th day of January, 1864, Polson and wife sold and conveyed the land to Welch, but says that Welch at the time paid to Polson all the purchase-money. He admits the recovery of the judgment by Young, the payment thereon, and the assignment of the residue of the judgment to him, the issuing of

the execution, levy on, and sale of the land by the sheriff, the purchase of the same by him, and the receipt of a deed therefor from the sheriff. He avers that his judgment was a valid lien on said real estate, and was prior and superior to that of the plaintiff by virtue of his mortgage; that the plaintiff's note and mortgage were executed on or about the 4th day of March, 1864, and that he, to defeat the lien of the judgment of Young, and to defraud the owner and holder thereof, procured said note and mortgage to be dated back to the 26th day of January, 1864, the date of the execution of the deed from Polson to Welch, and wrongfully and falsely procured to be inserted in the said mortgage that the note was given for the purchase-money of said lands, when in truth it was given for money paid by him for Welch.

Third. And the defendant, for further answer says that the said mortgage does not bear the true date of its execution; that it was executed on the 12th day of March, 1864, and was dated back to the 26th day of January, 1864, by the request of the plaintiff, to defeat the title of the defendant; that the mortgage was not recorded until the 14th day of November, 1864, over ten months after it was executed; that after Welch executed the note and mortgage to the plaintiff, and before the mortgage was recorded, Welch sold and conveyed the land to one Shaul, who is now the occupant thereof; that Shaul and wife executed to Welch a note and mortgage on the land for the balance of the purchase-money; that before the plaintiff's mortgage was recorded, Welch, for a valuable consideration, assigned said note and mortgage to this defendant, and the defendant is now the owner and holder thereof; and that at the time Welch conveyed to Shaul, and when Welch assigned the note and mortgage to defendant, the defendant and Shaul had no knowledge whatever of the note and mortgage of the plaintiff, which he avers were executed in consideration of money paid by plaintiff for Welch, and were not for part of the purchase-money of said real estate; wherefore he has a paramount lien; he asks a decree to that effect, and that his title be quieted, etc.

And for additional and fourth paragraph, he says he denies all the material allegations in the plaintiff's complaint.

Welch and wife answered: first, admitting the execution of the note and mortgage, but say they were obtained by fraud, in this, that the mortgage was not given for the purchase-money of said real estate, but to secure the plaintiff as surety for Welch, and against the payment of a note executed by Welch to one Pyke, for two hundred and fifty dollars borrowed from Pyke by Welch; and the plaintiff and one Joel Richardson became sureties thereon; and that the words in the note, "for purchase-money of said real estate," were inserted in said mortgage by the hands of the plaintiff, the defendants Welch and wife being persons that could not read or write; that the mortgage was not executed on the 26th day of January, 1864, but was executed, for the consideration stated above, three weeks after the 26th day of January, 1864, and was dated back, or ante-dated, by the procurement of this plaintiff; wherefore, etc. Second, that in the month of January, 1864, the plaintiff, being about to erect for himself a house, agreed to pay Welch six hundred dollars to do the carpenter's work, that he commenced the work, and performed one-half of the work, worth two hundred dollars, a bill of particulars of which is filed; and that afterward the plaintiff compelled him to quit the work, to his damage two hundred dollars; and that the work was to discharge the note on which the suit is brought. Third, that before, and at the time of the commencement of this action, Ham, the plaintiff, was, and still is, indebted to him in the further sum of seventy-five dollars for work and labor done and performed by Welch for him, at his request, etc.

There was a reply in denial of the second and third paragraphs of the answer of Welch and wife, and the second and third paragraphs of the answer of Milliken; and to the third paragraph of the answer of Welch there was also a reply of payment.

The issues thus formed were tried by a jury, who found

for the plaintiff against David Welch, and assessed his damages at, etc., and that he have foreclosure of mortgage against all the defendants.

There was a motion for a new trial by Welch, and also by Milliken. Welch assigns as reasons the improper admission of evidence on behalf of the plaintiff, and the wrongful rejection of evidence offered by the defendant; excessive damages; error in the assessment of the damages; that the verdict was not sustained by the evidence, and was contrary thereto, and contrary to law and the evidence.

Milliken assigned as reasons, errors of the court in its rulings on the pleadings (?), in refusing evidence offered by him, in admitting evidence over his objection, in refusing charges asked by him, and in giving charges over his objection and exception; that the verdict of the jury is not sustained against him by sufficient evidence, is contrary to the evidence and law of the case; and in refusing to strike out part of the complaint (?).

It may be remarked, before proceeding to consider the alleged errors, that the reasons for a new trial, so far as they concern the decisions of the court on the questions relating to striking out parts of the pleadings, are wholly unnecessary; and that the making of the motion for a new trial, and its being overruled by the court, do not present the question to us of the correctness or incorrectness of such ruling. Such questions can only be reserved by bill of exceptions. They are not reasons for a new trial, because they are not errors committed during the trial. A new trial is only a judicial re-examination of the issues of fact in the case, and the granting of a new trial does not go back to and include a re-adjustment of the issues, or a re-examination of the questions presented in arriving at the issues, whether those questions were raised by demurrer to a pleading, or by a motion, sustained or overruled, to strike out parts or all of any pleading.

The first alleged error which we are required to notice is the overruling of the demurrer of Milliken to the complaint.

We confess that the questions discussed under this assignment are not free from difficulty. We have, however, arrived at the conclusion that the allegations of the complaint are sufficient to show a resulting trust in favor of Ham for the amount of money which he alleges he paid toward the price of the land. We come to this conclusion, in part at least, from the authority of *McDonald v. McDonald*, 24 Ind. 68.

It is claimed, however, by counsel for the appellants, that the taking of the mortgage by the appellee was a waiver or giving up of this interest, and left Ham to claim only by virtue of the mortgage lien. We think this objection to the claim of the plaintiff, as founded on a resulting or implied trust, must be sustained. By taking the note and mortgage, the plaintiff converted his interest in the land into a mere debt, secured by the mortgage. For this reason the complaint was bad, and the demurrer of Milliken thereto should have been sustained.

The next question relates to the correctness of the instructions given and refused by the court. The court gave this instruction:

"The whole answer of Milliken presents two main questions: 1. Were the note and mortgage made and executed on the day of their date, or were they made and executed on some subsequent day, and dated back to that date, and did Ham pay the purchase-money to Polson? 2. If the note and mortgage were ante-dated, and Ham paid the purchase-money, was there a verbal contract made between Ham and Welch, at the time of the sale and the payment of the purchase-money, that Ham should hold a lien on the land until the purchase-money should be paid by Welch to Ham, and did Milliken have full knowledge of such verbal contract before he purchased the Young judgment? If the jury believe, from the evidence, that the notes and mortgage have the true date, and that Ham paid Polson the purchase-money, they should find for the plaintiff against Milliken."

Also: "If the jury believe, from the evidence, that the

note and mortgage were made and executed on a day after date, but were dated back to the 26th of January; and if the jury further believe that at the time of the sale by Polson to Ham, Ham furnished the purchase-money, and Welch and he agreed, by mutual consent, that Ham should hold a lien on the land until the payment to Ham of the purchase-money, and that Milliken had full knowledge of such verbal contract before he purchased the Young judgment, they should find for the plaintiff against Milliken."

It is very evident that in these instructions the court did not put the case on the same grounds on which it was put by the plaintiff in the complaint. Had the complaint put the case on the ground that a lien on the land was contracted for by parol, and was afterward consummated by the execution of the mortgage, very clearly it could not have been sustained as against the lien of the judgment. It is only because we regard the complaint as showing facts from which the plaintiff had an equitable estate in the land in consequence of an implied or resulting trust, that we hold it sufficient on this point. We are not aware of any rule of law by which, under such circumstances, a valid lien on land can be reserved or created by parol. Neither the allegations in the pleadings nor the evidence seem to us to justify these instructions. Ham's evidence on this point is as follows:

"In the winter of 1864, Welch moved into the vicinity of Fairfield; was going to put up a meeting house; was a poor man. I borrowed one hundred and fifty dollars of Pyke and one hundred from Hughes, and bought the land described in the mortgage; the money went to Polson; he was the owner of the land, and Welch took it in trust. I was to be made safe for the payment of the money I advanced. This was the agreement between Welch and me. I do not recollect just the language of the agreement; he said he would make me safe; he agreed to give me a mortgage; he told me he would make me safe in the money. A week after he told me he would make me a mortgage, and

made the mortgage; Prime made it; he was a notary public. I paid the money to Pyke and Hughes. I took Richardson with me, and he went my security. I do not remember whether Welch's name was on the note or not."

Welch, on the same point, testified as follows:

"I cannot exactly remember the date of the mortgage; it was made in February, 1864. I met Joel Richardson, and he advised me that Pyke had the money to loan. I took Richardson and Ham, and we went to Pyke, and I told him I wanted the money, and I would give him security. I wrote the note, and Pyke said he did not know Ham, but if Richardson would sign it, he would let me have it. Myself, Ham, and Richardson then signed the note, and I got the money. Ham and Richardson signed it as security. I borrowed it (\$150) of Pyke on the 25th or 26th of January, 1864. I borrowed it until the next Christmas. I gave Richardson and Ham no security at that time. Pyke had not the money. Richardson had it; he had borrowed it from Pyke, and paid it to me the next day for Pyke at Ham's. Ham and myself, in February—say the middle of February—went to Prime to get the mortgage. I told Ham when I got the money that I would not take the money unless I got his job. Two or three weeks after I bought the land, I went to Ham, and told him I had better give him a mortgage to secure him, and told him about Young's judgment. I paid Polson a part of the money the next day after I got it. I paid Polson all down but a small portion."

One Thompson testified that he paid Polson, for Welch, twenty-four or twenty-five dollars of the purchase-money.

Richardson testified: "I was surety for Welch to Pyke on note for the borrowed money. Welch drew the note. Pyke called on me first; I refused; then on Ham, and he refused; and then Welch drew it. I cannot recollect the amount. I recommended Ham to Pyke as being solvent. Can't recollect who got the money."

This evidence does not justify the conclusion that Ham had any interest in the property by resulting trust, nor that

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he had any valid lien on it prior to the time of the execution of the mortgage, which was some time after the date of the conveyance of the land by Polson to Welch, at which time the judgment lien attached. The mortgage does not bear the true date of its execution. It was dated back to correspond with the date of the Polson deed; but this does not add anything to its force and effect. It took effect from its delivery, and not from the day of its date. *Love v. Wells*, 25 Ind. 503.

The judgment is reversed, with costs, and the cause remanded.

A. Brouse, N. Purdum, and M. Bell, for appellants.

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JUDGMENT.—*Process.*—A judgment rendered against a defendant not served with process, and who does not appear in person or by attorney, is void.

APPEAL.—*Void Judgment.*—A party has the right to appeal from, and obtain the reversal of, a void judgment.

ACTION.—*Party.*—No one can maintain an action unless he has some interest in the matter in controversy.

SAME.—The interest necessary to the maintenance of an action may be separate, or joint, or in common; if the interest is separate, then the action must be brought separately by each person interested. If the interest is joint, then all persons interested must unite as plaintiffs, but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. When the question involved is one of common or general interest to many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

STATE BOARD OF EQUALIZATION.—The State Board of Equalization of 1869 was illegal in its construction or organization; and in consequence thereof, its acts were illegal and void.

SAME.—*Action.*—*Parties.*—*Injunction.*—Although the order made by the State Board of Equalization in 1869, directing twenty per cent. to be added to the valuation of real estate in Grant county was illegal and void, and the tax arising from this illegal addition has been paid into the State treasury; an action cannot be maintained by the Board of Commissioners of Grant

86	175
128	300
36	175
144	275
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86	175
150	345
86	175
155	11
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86	175
150	301

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county jointly with a tax payer of said county, to have the county treasurer restrained from paying into the State treasury a like sum of legal taxes subsequently collected, and to have him retain the same in his hands for the plaintiffs.

SAME.—If it had been alleged and shown that said tax payer owned taxable real estate, and had paid his taxes for 1869, and that he had a common and general interest with many persons, or that the parties were numerous and that it was impracticable to bring them all before the court, then he might have maintained an action for himself and for the benefit of the whole in a case where the facts entitled them to relief.

SAME.—*Board of Commissioners.*—If money was illegally collected from the owners of real estate in Grant county, by reason of an illegal order made by the State Board of Equalization, it belongs to the owners of the real estate, and not to the board of commissioners of said county. The board of commissioners cannot maintain an action for the money, in their official and corporate capacity, unless the money if collected would belong to the county.

COUNTY TREASURY.—When money is paid into the treasury of a county, it must remain there until paid out in the manner prescribed by law.

ILLEGAL TAX.—*State as Trustee.*—If an illegal tax is collected and paid into the State treasury, the State holds it in trust for the persons who paid it. If the money was collected by the sale of the tax payer's property, or was paid under protest to avoid such sale, the State becomes the legal trustee; but if it was voluntarily paid, and not under protest, the State then becomes the equitable trustee.

ACTION AGAINST THE STATE.—The State cannot be sued, nor can the same object be accomplished by indirection.

CREDITORS OF THE STATE.—If an illegal tax has been paid, and it has gone into the State treasury, the persons paying the tax are the creditors respectively of the State to the amount of illegal tax which each has paid, and like other creditors of the State their remedy is to ask the law making power to make the proper appropriations.

TAX.—*Illegal Tax.*—*Statute Construed.*—Sections 120 and 121, 1 G. & H. 101, were intended to meet and provide for individual and occasional instances of erroneous charges and miscalculations, and were not intended to apply to and govern a case where an illegal tax has been assessed against almost the entire body of tax payers in a county.

SAME.—*Injunction.*—*Voluntary Payment.*—Persons who have illegal taxes assessed against them may enjoin the collection of the same. If they fail to do so and voluntarily pay the same, their only remedy is an appeal to the justice of the law making power.

APPEAL from Grant Circuit Court.

BUSKIRK, J.—This was an action commenced in the Grant Circuit Court, by the Board of Commissioners of Grant county and John Brownlee, plaintiffs, against John C. Shoe-

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maker, Auditor of State, William Neal, auditor of Grant county, and Reuel J. Gauntt, treasurer of Grant county, defendants.

The complaint was filed April 10th, 1871, and on the same day a temporary restraining order was granted prohibiting the defendant Gauntt, as treasurer of Grant county, from paying over certain state taxes collected by him to the treasurer of state.

The record shows that upon the filing of the complaint process issued for the defendant Shoemaker, as Auditor of State, but that it was never returned, the record stating affirmatively the non-return of the process.

At the June term, 1871, of said Grant Circuit Court, the defendant Neal, as auditor, and the defendant Gauntt, as treasurer of Grant county, filed their separate answers to the plaintiff's complaint, each answering a substantial admission of the allegations of the complaint. The record shows no appearance by the defendant Shoemaker, nor does it disclose any fact from which it is possible to infer that the court below ever, in any way, acquired jurisdiction of his person.

The plaintiff filed a reply to said answers, denying so much thereof as is inconsistent with the complaint. Afterward, and at the June term, 1871, a default was taken against the defendant Shoemaker, and thereupon a final decree was rendered in conformity with the prayer of the complaint, and perpetually enjoining the defendant Gauntt from paying certain state taxes collected by him as treasurer of Grant county into the state treasury.

A brief statement of the matters alleged in the complaint, and found and adjudged by the final decree, seems to be necessary to a proper understanding of the case.

The complaint commences as follows:

"The Board of Commissioners of Grant county, in the State of Indiana, and John Brownlee, a citizen and tax payer of the said county of Grant, who is charged with the illegal taxes hereinafter named, and others who join and contribute,

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etc., complain of John C. Shoemaker, Auditor of the State of Indiana," etc.

The allegations of the complaint which follow are briefly these, namely :

That there was made by and returned to the proper officers of Grant county, in the year 1869, a legal and valid appraisalment of the taxable real estate situated within the said county, after which a legal county board of equalization was held in the said county; second, that subsequently there met at Peru, Miami county, Indiana, the county auditors of the several counties in the eighth congressional district of the State, who held and constituted themselves into a pretended board of equalization, and among other things appointed one of their number to act as a member of the State Board of Equalization to meet at the city of Indianapolis; that said pretended board of equalization had no power or authority to hold said session at the time and place, nor had they power or authority to so appoint one of their number a delegate to attend said State Board; third, that afterward, one of the auditors from each of the congressional districts of the State, including said auditor so appointed by and from said eighth district, met at Indianapolis and constituted themselves into a pretended State Board of Equalization, and continued in session more than twelve days, the law in such cases allowing them to remain in session but ten days; fourth, that said pretended State Board of Equalization, on the twelfth day of their said pretended session, made an order, together with other orders relating to other counties, that the valuation of the real estate in Grant county should be increased, etc., twenty per cent., etc.; fifth, that in pursuance of said order, the auditor of state issued to the several county auditors, including the auditor of Grant county, a circular or order to increase the valuation of said taxable property as aforesaid; sixth, that the auditor of Grant county, in obedience to said order, made out and delivered to the treasurer of said county the tax duplicate of said county for the years 1869 and 1870, based upon and

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including said addition of twenty per cent.; seventh, that the state, school, and sinking fund taxes so made out and charged in said duplicates for said county for the years aforesaid, are for each year twenty-seven thousand dollars; that all of the taxes for 1869 have been collected and paid over to the proper treasurer of state, except such as became delinquent, and that a large part of the taxes for 1870, have been by said treasurer of Grant county collected, but have not been paid over to the state treasurer; eighth, that said order of said pretended State Board of Equalization, increasing said taxable property in the valuation thereof, was and is void, etc.; ninth, that said auditor of state is requiring said treasurer of Grant county to pay over said taxes so collected for 1870, and also such of the taxes for 1869 as may not have been paid over; and unless the said treasurer is restrained, he will pay the same over, including said amount so wrongfully collected on account of the said addition of said twenty per cent.; tenth, that said auditor of Grant county is about to make out the duplicate for 1871, so as to include such wrongful addition of twenty per cent. Then follows a prayer for special and general relief.

The decree of the court below, after adjudging the auditor of state to have made default, finds as follows, namely:

First, that said order of said State Board of Equalization, made in 1869, is illegal and void, and that the addition of twenty per cent., made to the value of the taxable real estate in said county, made in pursuance of said order, was and is illegal.

Second, that this illegal increase amounted on all the real estate in said county, in the aggregate for the year 1869, to \$544,760, and for the year 1870 to the like sum of \$544,760.

Third, that the taxes collected for state, school, and sinking fund purposes for 1869, and paid over to the state treasurer, amounted in the aggregate to the sum of \$2,069.50.

Fourth, there has been collected of the delinquent taxes of 1869, the sum of \$2,400, of which \$233.84 is illegal, as

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being the proceeds of said illegal addition to the valuation of real estate.

Fifth, that the total illegal tax collected on the duplicate of 1869, for state, school, and sinking fund purposes, including that paid over to the state treasurer, and that still in the hands of the county treasurer, is \$2,303.34, as follows:

Collected and paid over.....	\$2,069.50
Delinquent tax of 1869, collected in 1870, and still in hands of county treasurer.....	233.84

Total.....	\$2,303.34
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That of this total of \$2,303.34, \$842.70 thereof were levied and collected for state purposes proper: \$898.81 for school purposes, and \$561.81 for sinking fund purposes.

After making these and a few other special findings, the court decrees that the defendant Reuel J. Gauntt, treasurer of said county, retain in his hands for the plaintiffs, of said delinquent taxes of 1869, by him collected, the said sum of \$2,303.34, which sum he is enjoined from paying over to the auditor or treasurer of state; that this decree be a sufficient voucher to said treasurer for not paying the same over.

The first error assigned is that a default was taken against John C. Shoemaker, the Auditor of State, and a final decree rendered without service of process on him, without his appearance in person or by attorney, and without jurisdiction having been acquired, in any way, of his person. That the judgment rendered against John C. Shoemaker, Auditor of State, is erroneous and void, as to him, is too plain to require either argument or the citation of authorities. We are unable to understand how such a judgment was rendered and entered of record, when it was apparent on the face of the record that he had not been served with process, and had not appeared to the action. There seems to have been a want of that care and attention that should characterize all judicial proceedings. If the appellant, Shoemaker, had been served with process, but failed to appear, and was defaulted, the writ and return thereon should have been made a part

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of the record; and unless this was done, the judgment would have been erroneous as to him. It has been suggested, in argument, by the learned counsel for the appellees, that the appellant was not a necessary party, and that, therefore, the judgment should not be reversed for this cause. When counsel discover that they have made unnecessary parties they should dismiss as to them, and not take a default without having in any manner acquired jurisdiction of their persons. A party has the right to appeal from and obtain the reversal of a void judgment or decree.

The second error assigned is, that the plaintiffs below, upon their own showing, have no cause of action. We think that this position is abundantly sustained by the facts in this case, and is supported by the well settled principles of law. No one can maintain an action in our courts unless he has some interest in the matter in controversy. Under our code of practice, the action must be brought in the name of the real party in interest, except that an executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is brought.

The interest necessary to the maintenance of an action may be separate, or joint, or in common. If the interest is separate, then the action must be brought separately by each person interested, for those having a separate interest cannot join in an action. If the interest is joint, then all persons interested must unite as plaintiffs; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. When the question involved is one of a common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. 2 G. & H. 34 to 37, secs. 3 and 4, and p. 47, sec. 19.

So far as appears from the complaint, the plaintiffs in this action have no interest, joint, separate, or in common with

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others, in the money which the county treasurer is required to retain for them in the county treasury, and which he is enjoined from paying into the state treasury. The plaintiffs below are volunteers in a controversy where they have no rights to assert and no duties to perform, concerning a matter in relation to which they labor under no responsibilities.

What are the facts? The State Board of Equalization of 1869, owing to fatal technical objections, was illegal in its constitution or organization, and in consequence thereof its acts were illegal and void, as was held by this court in the case of *The State, ex rel. Evans, Auditor of State, v. McGinnis, Auditor of Marion County*, 34 Ind. 452. This board, however, in equalizing the valuation for taxation of the taxable real estate situated in the eighth congressional district, made an order requiring twenty per cent. to be added to the value of the real estate subject to taxation, situated in Grant county. The auditor of state, believing this order to be valid, directed the auditor of Grant county to carry it out. The auditor of Grant county, acting in good faith, carried out the instructions of the auditor of state in making out the duplicates for 1869 and 1870, by adding in said duplicates twenty per cent. to the valuation of each tract or parcel of real estate entered on said duplicates for taxation. In consequence of this, the owners of real estate situated in Grant county, who paid their taxes assessed in 1869, paid an excessive tax for state, school, and sinking fund purposes, because they paid on an excessive and illegal valuation of the several parcels of real estate owned by them respectively. How much excess each owner paid does not appear, but the aggregate amount of the excess paid by all the owners of real estate situated in Grant county, assessed for state, school, and sinking fund purposes for 1869, and paid without being returned delinquent, amounted to two thousand and sixty-nine dollars and fifty cents. This sum was paid into the state treasury by the treasurer of Grant county. Some of the taxes assessed in Grant county, on both personal and real estate, for state, school, and sinking fund purposes for 1869, were returned

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delinquent, and a part of these delinquent taxes were paid in 1870, amounting to twenty-four hundred dollars. Of this amount the larger portion, to wit, twenty one hundred and sixty-six dollars and sixteen cents, was legally assessed and collected, while the residue, two hundred and thirty-three dollars and eighty-four cents, is the proceeds of this illegal addition of the twenty per cent. to the value of the real estate situated in Grant county. Now, because a certain class of persons liable to be taxed in Grant county (namely, persons owning real estate in that county) paid to the State an illegal or excessive tax on their real estate for the year 1869, amounting in the aggregate to two thousand and sixty-nine dollars and fifty cents, it is assumed that the courts of Grant county can enjoin the treasurer of Grant county from paying into the treasury of the State the like sum of two thousand and sixty-nine dollars and fifty cents of legal taxes subsequently collected by said county treasurer for the State. The decree in this case is based on this assumption, and directs the county treasurer to retain for the plaintiffs (that is, for the board of county commissioners of Grant county and John Brownlee), out of the delinquent taxes of 1869, a certain sum which he is enjoined from paying into the state treasury.

This decree, and the assumption on which it is based, cannot stand, except upon the hypothesis that the tax illegally collected in 1869 on the real estate situated in Grant county belongs to the board of commissioners of Grant county and to John Brownlee, or to the one or the other of them, or upon the supposition that the said board of commissioners and John Brownlee are the trustees for, or guardians of, the persons who paid the tax.

We do not think that either assumption can be sustained. If the money was illegally and wrongfully collected from the owners of real estate, it belongs to them and not to the board of commissioners of said county. They do not sue in their individual characters as citizens and tax payers, but in their official and corporate capacity. They cannot maintain the action in that capacity, unless the money belongs to

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the county, and when collected should be paid into the county treasury and become a part of the funds of the county. This theory cannot be sustained, in reason, on principle, or by the authority of adjudged cases. The money was paid by the owners of real estate in that county, and not by the tax payers generally. The board of commissioners of that county have no authority to sue for and on behalf of such tax payers. But suppose the money was retained in the county treasury, what would the board of commissioners do with it? They are not the trustees or guardians of such tax payers, and could not legally pay the money back to the persons who paid it. When the money is once paid into the treasury of the county, it must remain there until it is paid out in the manner prescribed by law. The treasury of Grant county has no claim, either legal or equitable, to this money. If it became a part of the general fund of the county, it would inure to the benefit of such persons as paid taxes only on their polls and personal property, as well as to the persons who paid the taxes on their lands, and it is quite certain that they have no interest in or claim on it. If the money was unlawfully collected from such tax payers by the State, does it legalize the exaction by transferring the proceeds from the state treasury to the treasury of the county in which the lands are situated? Is it so, that the proceeds of an illegal tax collected by the State become the property of the county in which the land upon which the tax was levied happened to be situated? We do not think so. If an illegal tax is collected by the State, and is paid into the state treasury, the State holds it in trust for the persons who paid it. If the money was collected by the sale of the tax payer's property, or was paid under protest to avoid such sale, the State becomes the legal trustee; but if it was voluntarily paid, and not under protest, the State then becomes the equitable trustee.

Nor does it appear from the record that John Brownlee has any interest in this action, or any right to maintain the suit. It is alleged in the complaint that he is a citizen and

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tax payer of Grant county, but it is not alleged that he is the owner of any taxable real estate in said county. If he paid no taxes on real estate, he paid none of the money in controversy, and, therefore, he has no interest in the action. If it had been alleged and shown that he owned taxable real estate, and had paid his taxes for 1869, and that he had a common and general interest with many persons, or that the parties were numerous and that it was impracticable to bring them all before the court, then he might have maintained an action for himself, and for the benefit of the whole, in a cause where the facts entitle them to relief.

Section 19 of our code (2 G. & H. 47) provides, that "those who are united in interest must be joined as plaintiffs or defendants." We think it is quite obvious that the board of commissioners of Grant county and John Brownlee, who sues for himself and others, have no such common interest in the subject-matter of this controversy as would authorize them in uniting as plaintiffs. The board of commissioners of Grant county could not possibly have a common interest with Brownlee and others in recovering from the State illegal taxes paid on real estate into the state treasury. The board of commissioners of Grant county do not and cannot hold any real estate which is taxable for state purposes. If they hold real estate in Grant county, they hold it in their corporate capacity for public purposes, free from taxation for state purposes of any kind.

This being the case, how can the board of commissioners have a common interest with the persons who paid these illegal taxes. Their interests are antagonistic to each other. The board of commissioners sue in their corporate capacity; and if they recover the money in controversy, it must go into the county treasury and become a part of the general fund. If Mr. Brownlee, suing for himself and others, recovers the money, it will go to the persons who paid in proportion to the amount paid by each.

But conceding that John C. Shoemaker, Auditor of State, was served with process, and that the plaintiffs have the

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right to maintain this action, can the decree in this case rendered by the court below be sustained? We entertain no doubt that the decree is wrong and must be reversed. This decree might have been sustained, if it had been made in 1869, while the treasurer of Grant county had in his hands these illegal taxes, but after the money has been paid into the state treasury, the treasurer of said county cannot be enjoined from paying over to the state treasurer a sum equal to the illegal taxes, which rightfully belongs to the State. The doctrine of set-off or recoupment is not applicable to a sovereign state. To enjoin an officer having moneys of the State in his hands from paying the same into the state treasury on the ground that the State has before received into her treasury a like sum to which she is not entitled, is tantamount to decreeing money to be paid out of the state treasury without an appropriation made by law to make such payment. The law imperatively requires the treasurer of Grant county to pay into the state treasury all the money in his hands belonging to the State; and the law absolutely prohibits the treasurer of state from paying out of the state treasury any money, except upon the warrant of the auditor of state, who cannot issue a warrant unless there has been an appropriation made by law. Section 3 of article 10 of our constitution provides, that "no money shall be drawn from the treasury, but in pursuance of appropriations made by law."

This is, in effect, a suit against the State, without the State or the treasurer of state being made a party. The State cannot be sued, nor can the same object be accomplished by an indirection. The theory upon which the State cannot be sued is, that the law-making power will do full and ample justice to all the citizens of the State. If the land owners of Grant county have paid an illegal tax, which has gone into the state treasury, they are the creditors respectively of the State to the amount which each land owner has so paid, and they must, like other creditors of the State, ask the law-making power to make the proper appropriations, and thus equalize the burdens of taxation.

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We have been greatly aided, and our labor much lightened, by the very able and carefully prepared briefs filed, and the clear and pointed oral argument made by the learned counsel engaged in this cause.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to dismiss the complaint.

ON PETITION FOR A REHEARING.

BUSKIRK, J.—The appellees have asked for a rehearing on two grounds.

In the first place, it is claimed that we erred in holding that where money had been collected by a county treasurer on an illegal assessment, and he had paid the same into the state treasury, the same could not be taken therefrom by a decree of a court, but that it could only be paid out in pursuance of appropriations made by law; and in support of this position we have been referred to sections 120 and 121 of the assessment law, 1 G. & H. 101, which read as follows:

"Sec. 120. Whenever it shall appear to the board doing county business in any of the counties of this State, that by reason of erroneous charges on the tax duplicate, or from any other cause, the treasurer of such county has paid and accounted to said board for more money than was justly due from him on account of county revenue, said board doing county business shall direct the auditor to credit said treasurer with the sum or sums thus improperly paid, and order the same to be refunded from the county treasury."

"Sec. 121. Whenever similar improper or erroneous payments have been made by any county treasurer to the state treasury, the board doing county business shall direct the auditor to certify said improper or erroneous payments to the auditor of state, under his seal of office, who shall audit and allow the same as a claim against the treasury, and the treasurer shall pay the same out of any moneys not otherwise appropriated."

We think that it is quite clear, that the above sections have

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no application to the case under consideration. The manifest purpose of the legislature was to provide a cheap and speedy remedy, without resort to a regular suit in the courts, for such erroneous charges and mistakes in calculations as might, and frequently do, occur, in making out duplicates and collecting taxes. It was intended to meet and provide for individual and occasional instances of erroneous charges and miscalculations; that the sections above quoted were not intended to apply to and govern a case like the one under consideration, where an illegal tax had been assessed against the almost entire body of tax-payers in a county. The remedy for persons who are thus illegally assessed is to enjoin the collection of such illegal taxes; and if they fail to do so, and voluntarily pay the same, their only remedy is an appeal to the justice of the law making power.

But the remedy provided for obtaining money that has been improperly paid into the state treasury is a special one, and must be strictly pursued. It does not contemplate a resort to the courts. The matter must be presented to the board doing county business, which shall direct the county auditor to certify such improper or erroneous payment to the auditor of state, under his seal of office, who shall audit and allow the same as a claim against the treasury, and the treasurer shall pay the same out of any moneys not otherwise appropriated. There is a valid appropriation as provided by the constitution, but the remedy provided must be strictly pursued, or the auditor of state would have no power to audit such claim. No power is conferred upon the courts to take jurisdiction, or render any decree in the premises. If the auditor of state should refuse to audit such claim he might be compelled to do so by mandate.

In the second place, it is claimed that we erred in ordering the suit to be dismissed, for the reason that it was shown that there were two hundred and thirty-three dollars of delinquent taxes collected on such illegal assessment and valuation, still in the hands of the county treasurer. The decision on the original hearing only extended to and

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embraced such taxes as had been actually paid into the state treasury.

We do not deem it necessary to modify our judgment, as the auditor of state will feel bound by our decision to allow the treasurer of Grant county credit for such delinquent taxes.

The petition is overruled, and the clerk is directed to certify the opinion to the court below.

B. W. Hanna, Attorney General, and *C. Baker*, for appellant.

J. Brownlee and *H. Brownlee*, for appellees.

THE NEVINS AND OTTER CREEK TOWNSHIP DRAINING COMPANY v. ALKIRE.

DRAINING ASSOCIATION.—Assessment.—Pleading Former Assessment.—The answer to an action to recover the amount of assessment levied by a draining company, against the owner of lands benefited by a ditch made by said company, alleged that there had been an appraisement and assessment of benefits prior to that upon which the assessment sued upon was levied, but did not allege that the appraisers were sworn to such former assessment, or that notice had been given to the owners of lands of the time of making such assessment.

Held, that the answer did not allege a valid prior assessment.

SAME.—Lands not Assessed.—The omission to assess lands subject to assessment under the provisions of the law for the construction of drains, renders the assessment made invalid.

SAME.—Estoppel in Pais.—An answer to a complaint for recovery of assessment levied by a draining company alleged a prior assessment; the reply alleged that the defendant requested and assented to the making of the new assessment, and that the company expended money in making the drain on the faith of the defendant's expressing satisfaction with the new assessment, and standing by while the improvement was made.

Held, that the reply was good.

APPEAL from the Vigo Common Pleas.

DOWNNEY, C. J.—The complaint in this case, by the appel-

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lant against the appellee, alleges that the plaintiff is a duly organized corporation under and by virtue of the laws of the State of Indiana; that at the March term, 1868, of the commissioners' court, on application of the company, the board of commissioners appointed appraisers to assess the amount of benefits or injury to all the lands liable in any way to be affected by the construction of a certain ditch or drain known as the "Nevins and Otter Creek Township Drain," describing the same. That on the 10th day of April, 1868, said appraisers, having examined all the lands liable, etc., made their list of assessment, assessing two hundred dollars upon certain real estate of the defendant, described in the complaint; that said list was duly verified, returned, and filed with the clerk of the board, who caused the same to be recorded in the recorder's office of the county, a copy of which is filed with the complaint; and that the defendant had due notice of the time of making said assessment; that afterward, on the 27th day of April, 1868, the board of directors, to raise means for the prosecution of said work, levied a sum equal to ten per cent. on said assessment. On the 31st day of July, 1868, they made a further levy of twenty per cent.; and on the 16th day of September, 1868, they made an additional levy of twenty per cent. thereon, making in all fifty per cent., the defendant being duly notified thereof; wherefore the defendant became liable, etc., yet he has failed to pay, and plaintiff asks judgment, etc.

The defendant answered: first, the general denial; second, that at the June term, 1866, of the board of commissioners, the said board, on petition of the board of directors of said company, appointed three other persons appraisers to assess the amount of benefits and injury to the lands to be affected by the construction of said work; that the said appraisers examined said lands and made an assessment pursuant to law, and returned the same to the clerk of the board of directors; but the board directed the clerk not to file the same with the auditor, and the same was never filed in the office of the recorder by him, wherefore, etc.; third, that said

drain is of no public utility; fourth, that his lands are in no way benefited by said drain, and are improperly, illegally, and extravagantly assessed in said assessment.

The plaintiff replied by a general denial of the answer; and for further reply to the second paragraph of the answer, says, that the appraisement made by the appraisers, mentioned in the second paragraph of the answer, was unsatisfactory to the land owners on whose lands assessments were made, including the defendant, and was also informal, in this, that all the lands benefited by the ditch or drain were not assessed, but by mistake some of said lands were left out by said appraisers, and the said land owners and the company desiring another appraisement, the company, at the request of, and with the defendant's consent procured the second appraisement named in the complaint to be made, the other land owners and the company agreeing to set aside the first appraisement and to have another, etc.; third, that the appraisement made, as mentioned in the second paragraph of the answer, when so made as stated in said answer, was unsatisfactory to the owners of the land, and particularly so to the defendant; and the company, at the request of the said land owners, including the defendant, applied to the board of commissioners to appoint new appraisers, and failed to file the original appraisement in the recorder's office for that reason, the said defendant and other land owners consenting thereto; and said company, at the request of said owners of land, including said defendant, procured the appointment of the appraisers and appraisements mentioned in the complaint, and made said appraisements, and under the faith thereof spent the sum of two thousand dollars in constructing said ditch, relying on the said appraisement to reimburse said company for such outlay; and the defendant and other land owners were present when the said appraisements, named in the complaint, were made, and acquiesced in the same, and pointed out their lands to the appraisers, and the supposed advantages and disadvantages of the work to each, and to his own and his neighbor's lands, and ex-

pressed themselves satisfied therewith, and stood by afterward and saw the plaintiff expend large sums of money in the construction of said ditch, on the faith of said assessments and their acquiescence therein; wherefore the defendant is estopped, etc.

A demurrer to the second paragraph of the answer was overruled; and demurrers were sustained to the second and third paragraphs of the reply. Exceptions were properly taken. Plaintiff refusing further to reply, judgment was rendered for the defendant.

The first question for our decision is as to the sufficiency of the second paragraph of the answer. Conceding, for the present, that no second assessment can be made, after one assessment has been legally made under the law, the question arises, does the second paragraph of the answer show that such an assessment was made? We think, in at least two essential particulars, the second paragraph of the answer fails to show a valid assessment: first, the appraisers do not appear to have been sworn to the assessment as required by law. 1 G. & H. 304, sec. 12. Second, no notice appears to have been given of the time of the making of the assessment, to the owners of the land, as required by sections 13 and 14 *id.* For these reasons, the assessment referred to in the second paragraph of the answer was not valid, and could not constitute any sufficient reason why a valid assessment should not afterward be made. The demurrer to this paragraph of the answer should have been sustained.

The next question is as to the second and third paragraphs of the reply. For the same reasons that have led us to hold the second paragraph of the answer bad, we must hold that these paragraphs of reply are good. The second paragraph of the reply shows that a considerable portion of the lands which should have been assessed was omitted. This, according to decisions of this court in the cases under the gravel road law, rendered the assessment invalid. But, in addition to this, it is alleged that the defendant requested and assented to the making of the new assessment. The

third paragraph of the reply is even stronger than the second. It states that the new assessment was made by the consent, and at the request of the defendant; and that the company expended two thousand dollars in making the improvement, on the faith of the assessment, the defendant expressing himself satisfied with the assessment, and standing by while the improvement was being made. Under these circumstances, he could not very well be allowed to say that he should not pay his proportionate share of the expenses of the work. A principle quite analogous to this has been decided by this court, in relation to assessments for street improvements. *Hellenkamp v. The City of Lafayette*, 30 Ind. 192.

The judgment of the common pleas is reversed, with costs, and the case remanded.

J. P. Baird, C. Cruft, and J. M. Allen, for appellant.

W. Mack, for appellee.

NOBLE and Others v. WITHERS, Administrator.

JUDGMENT.—*Form of.*—*Against Heirs.*—Where a widow who had been the second wife of her deceased husband, brought suit against the children by his first marriage, claiming an interest in certain real estate on the ground that her deceased husband had invested her money held by him as such in the property, which her labor and economy had assisted in improving; *Held*, that it was not proper that a personal judgment should be rendered against the children and heirs.

WITNESS.—*Widow.*—In such a case, the widow cannot testify on the trial, unless required by the court or the opposite party, as to matters occurring prior to the death of the ancestor. Nor can she testify as to communications made to her by her husband during coverture.

SAME.—*Statute.*—The act of March 6th, 1865, on this subject was not changed by the act of March 11th, 1867.

APPEAL from the Allen Common Pleas.

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Noble and Others *v.* Withers, Administrator.

DOWNEY, C. J.—Mary Noble sued Goodman T. Noble and others, heirs of Nathaniel Noble, deceased. In her complaint she states, in substance, that she was the second wife of the deceased, he having had a former wife, by whom he left the defendants as descendants and heirs; that the deceased left certain real estate in Allen county, of which he was owner in fee simple, and which is described in the complaint; that at the time of her marriage to the deceased, in 1835, she owned and held in her own right money, property, and effects, choses in action, and realty arising from her former husband's estate, to the amount of one thousand dollars, which the deceased converted into money to be held in trust for her; that he did not claim said money by his marital rights, or receive the same with intent to hold it as his own, but only as her trustee, in which capacity he held the same at the time of his purchase of the said real estate in Allen county, and used the same to pay a portion of the purchase-money of the said real estate; that she had, by her labor and economy, assisted to improve said land and to rear his children, who were young at the time of her marriage to him. She prayed for judgment for partition of the lands, and asked that one-third thereof, or so much thereof as she might be entitled to, be set apart to her in fee simple, or that an adequate and fair allowance be made to her out of said land, or the proceeds thereof, to repay to her the amount of her said property invested therein, and for general relief.

An answer consisting of several paragraphs was filed by the defendants, to some of which demurrers were sustained; when, without any reply, the case was tried by the court, and a special finding made and conclusions of law stated, to which there was an exception.

Motions for a new trial and in arrest of judgment were made and overruled, and judgment rendered for the partition of the land so as to set off to the widow one-third thereof for her life, and for eighteen hundred and thirty-nine

dollars and eight cents as a personal judgment against the defendants, and that she have a lien on the land therefor.

Twenty-one errors are assigned by the appellants. We will not examine all of them. There is no brief for either party. The judgment, as a personal judgment against the defendants, cannot be sustained.

On the trial of the cause, the plaintiff was admitted as a witness for herself over the objection and exception of the defendants, and testified to her claim for the money on which the judgment was rendered against the heirs, and the lien declared against the land.

It is provided "that in all suits by or against heirs, founded on a contract with or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or by the court trying the cause," etc. 3 Ind. Stat. 560, sec. 2. Much of this testimony consisted of the narration of communications made by her deceased husband to the witness during coverture, which was wholly inadmissible under another provision of the statute, as well as at common law. 2 G. & H. 170, sec. 240; 1 Phillipps Ev. 78; 1 Greenleaf Ev. sec. 337.

It is not necessary to consume more time by a further examination of this record.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings.

WORDEN, J., was absent.

ON PETITION FOR A REHEARING.

DOWNEY, C. J.—In a brief filed with a petition for a rehearing, counsel for the appellee, for the first time, attempt to aid us in coming to correct conclusions in this case.

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They call our attention to the fact that the cause was tried before the act of March 11th, 1867, cited in the opinion, took effect. But this will not mend the matter, for that act was only a re-enactment of the act of March 6th, 1865, (Acts 1865, p. 58) which was in force when the cause was tried, and which, on the point in question, was the same as the act cited.

On the other point, relating to the exclusion of the evidence of the wife of communications made to her by her husband, we see no reason to change our opinion.

Let the petition be overruled.

D. H. Colerick and W. G. Colerick, for appellants.

J. Morris and W. H. Wethers, for appellee.

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APPEAL.—Jurisdiction of Courts.—The power and jurisdiction of the courts of this State are fixed and determined by the law of their creation, and the right to appeal from an inferior court to the Supreme Court is prescribed by the code. The right to appeal confers on the Supreme Court the power to review the judgment appealed from, if the appeal has been perfected according to law and the rules of court.

PROCEEDING FOR CONTEMPT.—Criminal Law.—Appeal.—A proceeding for contempt is a criminal proceeding, and our statute gives an appeal to the Supreme Court from all final judgments in criminal cases, and this right of appeal includes judgments in proceedings for contempt.

SAME.—Appeal.—Stay of Proceedings.—This right of appeal does not deprive inferior courts of the power to inflict immediate and summary punishment for contempt; for being a criminal proceeding, an appeal will not stay or supersede the judgment.

SAME.—Power to Punish for Contempt.—The power to punish for contempt is conferred upon the courts of this State by statute, and the language of the statute embraces both direct and constructive contempts.

CONTEMPT.—Direct Contempt.—A contempt is direct when committed before and in the presence of the court, or so near to the court as to interrupt the pro-

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ceedings thereof; and such contempts are usually punished in a summary manner, without evidence, but upon view and personal knowledge of the presiding judge.

SAME.—Constructive Contempt.—Contempts are constructive, when they are committed, not in the presence of the court, and tend by their operation to interrupt, obstruct, embarrass, or prevent the due administration of justice.

SAME.—Practice.—The proceeding against a party for a constructive contempt must be commenced by either a rule to show cause, or by an attachment; and such rule should not be made, or attachment issued, unless an affidavit is filed specifying the acts committed by the person accused of the contempt.

SAME.—Practice.—Trial.—When the rule or attachment has been served, the person accused has the right to be heard by himself and counsel. If the contempt is admitted, the court may render judgment on such admission, but if the defendant denies that he committed the acts complained of, or insists that they do not constitute a contempt, the court should hear the evidence, and determine the guilt or innocence of the party.

PARTIES.—Next Friend.—The *next friend* who prosecutes for an infant cannot be regarded as a party to the suit; the infant is the party.

SAME.—Seduction.—An infant female who by her next friend institutes an action for her own seduction is the plaintiff in the cause, and may or may not, as seems best to her, attend court and prosecute the suit.

SAME.—Contempt.—If the defendant in such suit by threats or intimidation induces the plaintiff to leave court, or abducts her against her will, he will be guilty of a contempt of court; but if she goes away of her own free will and accord, without persuasion or coercion on the part of the defendant, the fact that he, at her own request, aids and assists her to get away, will not make him guilty of contempt.

WITNESS.—Practice.—There is no law or practice that will authorize a party to have himself or herself subpoenaed as a witness to testify in his or her own behalf, and thus acquire the rights and protection that are afforded to witnesses.

CONTEMPT.—Release from Imprisonment.—If a defendant, while imprisoned on a charge of having abducted the plaintiff, files affidavits conclusively showing that there has been no abduction and no contempt, it is error to refuse to set aside the judgment and admit him to bail.

SAME.—Imprisonment.—The imprisonment for contempt must be for a certain and definite time, or must expire on the performance of a condition.

SAME.—Cases Overruled.—The case of *The State v. Tipton*, 1 Blackf. 166, and subsequent cases holding that an appeal will not lie in cases of contempt, are upon that point overruled.

APPEAL from the Jefferson Circuit Court.

BUSKIRK, J.—There was pending in the Jefferson Circuit Court, at the October term, 1871, an action wherein Emily I. Risk, by her next friend, Emeline Risk, was plaintiff, and the appellant was defendant, in which the plaintiff sought to

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recover damages for her alleged seduction by the defendant in that action, and the appellant in this appeal. On the 26th day of October, 1871, that being the 10th judicial day of said term, the attorneys for the plaintiff verbally alleged, in open court, that they were credibly informed that the plaintiff, Emily I. Risk had been abducted by the defendant, and informed the court that the said plaintiff had been duly subpoenaed by reading, on the part of the plaintiff, to attend and testify in said court, for and on behalf of the plaintiff, and against the defendant; and the said attorneys verbally moved the court for a writ of attachment against the defendant. The plaintiff was then called in open court, and failing to appear, an attachment was issued for the said plaintiff, to bring her body into court as a witness for the plaintiff, and for contempt of court, in not obeying the said process. The said attachment was placed in the hands of the sheriff, who afterward returned the same with an indorsement thereon, that the said Emily I. Risk could not be found. We are next informed by the record, that it was stated she was abducted on Monday, October 23d, 1871, but it fails to show by whom the statement was made, or upon what information.

Thereupon a writ of attachment was issued against the appellant, on which he was arrested and brought into court to answer for a contempt of court in said matter. The defendant then entered into a recognizance, with William Spencer as his surety, in the sum of one hundred dollars, conditioned for his appearance from day to day to answer for the said contempt.

On the same day the court proceeded to hear the testimony of the witnesses in relation to the alleged contempt of the said defendant.

From the testimony it appears that Emily I. Risk, Emeline Risk, her mother, and next friend in said action, and Greenberry Hays, her uncle, had gone to the city of Madison to attend court as witnesses in the said action for seduction, and were stopping with William Black, in the lower part of the city; that defendant went to the house of Mr.

Black on Monday evening about dusk and inquired for Mr. Black, and being informed that he was not at home, had left; that soon after the defendant had left, the said Emily I. Risk disappeared from the house; that soon afterward the defendant and some other man, who was unknown, were seen standing by a fence a short distance from the house of Mr. Black; that they stood still until Emily I. Risk came up to them when they took her by the arms and they started off together; that Emily had no money and no clothing except what she had on her person; that Emily was a weak-minded girl, and could only see with one eye; that the defendant had his hat drawn down over his eyes, which partially concealed his face.

There was no evidence that any coercion or force was used by the defendant, except taking hold of the arm of the said Emily; nor did it appear that the said Emily made any resistance or outcry.

After the evidence was closed, the court informed the counsel of the appellant that they would be heard as to whether he was guilty of contempt, but they declined to offer any evidence or make any argument. The matter was then adjourned until the next morning, when the court, of its own motion, required the defendant to be sworn, and to testify in reference to the said contempt, but the defendant refused to testify, and claimed the protection of the court, and his privilege on the ground that his testimony would tend to furnish evidence to convict him of a crime. The court decided that the defendant would not be required to testify.

The court then rendered the following finding and judgment, namely:

"Comes now the defendant, and the court, after hearing the evidence introduced, finds the defendant guilty of a contempt of this court; and further finds that he be imprisoned in the county jail of this county until the body of Emily I. Risk be produced in court, and until the costs herein are paid or replevied, unless sooner discharged by the court.

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It is, therefore, considered by the court that the defendant is guilty of a contempt of this court; that he stand committed to the county jail of this county until the body of Emily I. Risk be produced in this court, and until the costs of this attachment are paid or replevied, unless sooner discharged by the court."

To this judgment proper exceptions were taken, presented by a bill of exceptions. The court thereupon ordered the sheriff to commit the defendant to the jail, which was done without any warrant of commitment.

After the defendant had been committed to jail, his counsel moved the court that he might be heard in his defense, which motion was overruled, and an exception was taken. The defendant's counsel then moved the court to discharge the defendant from jail, on the grounds that, by law, he was not liable to imprisonment, and that he was guilty of no contempt, which motion was overruled and an exception taken.

On the eighteenth judicial day of the said term of said court, the defendant, by his counsel, filed the affidavits of himself and Emily I. Risk, and upon said affidavits moved the court to admit the said defendant to bail and to give him the opportunity to comply with the order of the said court, and purge his supposed contempt, which motion was overruled and an exception was taken.

The affidavit of the said Emily I. Risk was, in substance, the following:

"That she was the same Emily I. Risk who was the relatrix in a bastardy suit which had been pending in the Ripley Common Pleas; that the defendant in said proceeding, William Whittem, had made suitable provision for the support of her bastard child, and that she had gone into said court and dismissed the same; that she was the same Emily I. Risk who was the plaintiff in an action then pending in the Jefferson Circuit Court against the said William Whittem to recover damages for her seduction by the said defendant; that in the settlement of the said proceedings in bastardy it was

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agreed and understood, and constituted a part of the consideration of the said compromise, that the said defendant was to pay her the reasonable fees of her attorneys, and she was to release her action for her seduction and dismiss the said suit; that she intended to have dismissed the said action, but was prevented from so doing by her uncle, Greenberry Hays; that she had seen the defendant at her house on Sunday, the 22d of October, 1871, when she informed him that she had not been subpoenaed as a witness, that she did not want to attend court; that she wanted to go away; that she requested him to take her away, and told him that if he could not do so before, to wait until she went to court, and that he must then find out where she was staying and come there for her; that in pursuance of this arrangement, the defendant came to Black's house on Monday evening, just at dark; that she went out to meet him in the road, when he sent back after his buggy; and when it came they got in and drove to North Madison, and from there she had gone to Columbus on Tuesday morning; that in all this the defendant was acting at her request, as she did not want to attend court; that she left Madison of her own free will and accord, and for the sole reason that she did not wish to go on with the trial, and she was afraid that her uncle, Mr. Hays, would compel her to go on with it; that she had stayed away for said cause; that she was not then, and never had been, under any coercion or restraint by Mr. Whittem or any other person, except Mr. Hays; that she did not want to prosecute the said suit, as she regarded the whole matter settled; that the said Whittem had not, by word or act, frightened or intimidated her, nor persuaded her to go away; and that she was working by the week for people in Columbus who knew nothing of the matter."

The affidavit of the defendant was, in substance, the same, the only difference being that he detailed the matter with more minuteness and greater accuracy.

We are confronted at the threshold of this investigation with the questions of whether the appellant had a right of

appeal, and whether this court has the jurisdiction to review the finding and judgment of the court below.

The power and jurisdiction of the courts in this State are fixed and determined by the laws of their creation, and the right to appeal from an inferior court to this court is provided by the code. The right to appeal confers on this court the power to review the judgment appealed from, if the appeal has been perfected according to law and the rules of this court.

Section 550 of the code (2 G. & H. 269) gives the right of appeal in civil actions, and reads as follows:

"Sec. 550. Writs of error are hereby abolished. Appeals may be taken from the courts of common pleas and the circuit courts, to the Supreme Court, by either party, from all final judgments, except in actions originating before a justice of the peace, or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed ten dollars. The party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon."

The right of appeal in criminal cases is given by section 148 of the criminal code, 2 G. & H. 425, and is in these words:

"Sec. 148. An appeal to the Supreme Court may be taken by the defendant, as a matter of right, from any judgment against him, and upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed."

It has been adjudged by this court that the word judgment, as used in the above section, has reference to final judgments alone. *Miller v. The State*, 8 Ind. 325; *Reese v. The State*, 8 Ind. 416.

Was the proceeding under consideration a civil or criminal action? or did it so far partake of the nature of either that it is to be governed by the principles of law and rules of practice applicable to either of those actions? That it was not a civil action is too plain to admit of a doubt, or to justify a reference to authorities. The criminal law of this

State is entirely statutory, and not of common law origin. *Beal v. The State*, 15 Ind. 378. This is not, strictly speaking, a criminal action; for such a charge must either be presented by indictment or information. The record discloses the fact that this proceeding is in the name of the State of Indiana against William Whittem, charging him with a contempt of court; and a final judgment was rendered by which he was imprisoned in the jail of the county for an uncertain and indefinite period of time.

The case of *Crook v. The People*, 16 Ill. 534, was a proceeding against Crook and others for contempt, in disobeying an injunction, and the court held that it was not, strictly speaking, a criminal action, because no indictment had been found by the grand jury; but it was called a criminal prosecution for contempt; and while the court declined to decide whether an appeal could be taken in an information for contempt, it was held that the answer of the party charged with contempt could be controverted, and the fact alleged in excuse might be disproved.

In *Pitt v. Davison*, 37 N. Y. 235, the court held that there was a distinction between proceedings to punish for criminal contempts, and proceedings as for contempts to enforce civil remedies, and that in the former cases personal notification of the accusation was necessary.

The Supreme Court of the United States, in *Ex parte Kearney*, 7 Wheat. 38, which was an application for a *habeas corpus* to bring up the body of John T. Kearney, then in jail, upon the order and judgment of the Circuit Court of the District of Columbia, for contempt of court in refusing to testify as a witness, held, that that court had no jurisdiction of the case, for the reason that it had no appellate jurisdiction of criminal cases, and, that being a criminal charge, no right of appeal existed. The court say:

"If this were an application for a *habeas corpus*, after judgment on an indictment for an offence within the jurisdiction of the circuit court, it could hardly be maintained that this court could revise such a judgment, or the proceedings

which led to it, or set it aside and discharge the prisoner. There is, in principle, no distinction between that case and the present; for when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution."

Lord Chief Justice DE GREY, in *Brass Crosby, Lord Mayor of London*, 3 Wils. 188, said: "When the House of Commons adjudged any thing to be a contempt, or a breach of a privilege, their adjudication is a conviction, and their commitment, in consequence, is execution; and no court can discharge, on bail, a person that is in execution by the judgment of any other court."

In our opinion, these authorities demonstrate that a proceeding for contempt is in the nature of a criminal prosecution. The results and consequences are the same in the one proceeding as in the other. In both the party convicted may be deprived of his liberty and confined in jail, and subjected to the payment of a fine.

As has been shown, our statute gives an appeal to this court from all final judgments,

A judgment has been defined to be the "decision or sentence of the law given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury." Bouv. Law Dic.; Tidd's Prac. 930; 3 Bl. Com. 395 and 396.

The difference between an interlocutory and final judgment may be well illustrated by this proceeding. The court ordered an attachment for the defendant, and had him brought into court to answer to the charge of contempt. That was an initiatory step, and no appeal could have been taken; and if the court had ordered the defendant to be confined in jail until the charge of contempt could have been heard, that would have been an interlocutory judgment from which no appeal would lie. But when the court had heard the evidence and adjudged the defendant to be guilty of a contempt of court, and sentenced him to confinement in the county jail until he produced in court the body of Emily I.

Risk, and paid the costs of the proceedings, such decision became and was a final judgment.

We are well aware that there is a long and an almost unbroken line of decisions in this court, holding that an appeal would not lie from the judgment of an inferior court in a proceeding for contempt. The first case, and the one upon which all the others depend, is the case of *The State v. Tipton*, 1 Blackf. 166, which was an attachment against Tipton for contempt, in failing, as a sheriff, to execute a *capias ad satisfaciendum*. The court say:

"It is the opinion of this court, that in these cases we have no jurisdiction. Courts of record have exclusive control over charges for contempt; and their conviction or acquittal is final and conclusive. This great power is entrusted to these tribunals of justice, for the support and preservation of their respectability and independence; it has existed from the earliest period to which the annals of jurisprudence extend; and except in a few cases of party violence, it has been sanctioned and established by the experience of ages. *Lord Mayor of London's Case*, 3 Wils. 188, opinion of KENT, C. J., in the case of *Yates*, 4 Johns. 317; *Johnston v. The Commonwealth*, 1 Bibb, 598."

The case of *The Lord Mayor of London*, *supra*, was not in point, for two reasons; first, that was a proceeding by *habeas corpus*, and there being a judgment of conviction by a competent tribunal, the court could not, in a collateral proceeding, inquire into the legality of the imprisonment; second, the Lord Mayor of London had been convicted and imprisoned by the House of Commons, which possessed judicial power, and there being no court superior to Parliament, the court of King's Bench had no jurisdiction on appeal or by writ of error.

The opinions of Lord Chief Justice DE GREY and Justices GOULD and BLACKSTONE show the grounds upon which the judgment of the court was based. Lord DE GREY says: "All contempts are either punishable in the court contemned, or in some higher court; now the Parliament has no supe-

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rior court, therefore the contempts against either house can only be punished by themselves." Again: "When the House of Commons adjudge anything to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment, in consequence, is execution; and the court cannot discharge or bail a person that is in execution by the judgment of any other court. The House of Commons, therefore, having an authority to commit, and that commitment being an execution, the question is, what can this court do? It can do nothing when a person is in execution by the judgment of a court having competent jurisdiction; in such case, this is not a court of appeal."

The case of *The State v. Tipton* was not a collateral proceeding by *habeas corpus*, but was a direct proceeding by appeal from an inferior to a superior court, and therefore differed in every essential feature from the case of the Lord Mayor of London, and besides was for the contempt of the court by an officer of that court, in refusing to serve the process of said court, while in the latter case the contempt was against the House of Commons, for a breach of the privileges of the House, and that House possessed paramount and superior power over the courts of England.

The next authority referred to and relied upon was the opinion of Mr. Chief Justice KENT, in the matter of *Yates*, 4 Johns. 317, where Yates had been imprisoned by the court of chancery for malpractice as a master in chancery. The proceeding was by *habeas corpus*. Yates was discharged by Judge Spencer of the Supreme Court, and was afterward re-arrested and re-imprisoned by the chancellor, and the case was appealed to the Supreme Court, which court reversed the order of Judge Spencer in discharging him. The case was then appealed to the court of errors, where the opinion of the Supreme Court was reversed, and the opinion of Judge Spencer was affirmed. See *Ex parte Yates*, 6 Johns. 337. Instead of this case being an authority in support of the ruling of this court, it is in direct opposition to it, as are

many other decisions in that State, as will appear in a subsequent part of this opinion.

The next and last case relied upon by this court is that of *Johnston v. The Commonwealth*, 1 Bibb, 598, where the court held that no writ of error or appeal lies to an order punishing for contempt. The facts of the case are so imperfectly stated that it is almost impossible to tell the character of the contempt. The only statement is the following: "Ordered, that Gabriel J. Johnson, Esq., be sent to jail for the space of six hours, for a contempt of court." We infer that the contempt was committed in the presence of the court, and that no rule was entered to show cause, or attachment issued, or evidence heard. But the opinion in that case has been very materially modified in the case of *Bickley v. The Commonwealth*, 2 J. J. Marsh. 572, where the court say: "We conceive, in cases of contempt, the appellate court has authority to correct erroneous judgments and sentences, although it can not retry the question of contempt or no contempt. Suppose, for instance, a circuit court should inflict a fine of five hundred dollars for a contempt, without the intervention of a jury, when the statute limits the fine to ten pounds, might not this court rectify the error? We see no objection to doing it."

It is quite clear to us that two of the cases upon which the opinion in *The State v. Tipton* was based have been overruled or so modified that they have ceased to be authority, and that the other case was not in point. In such a case, ought not the opinion founded upon such cases be overruled, and especially when the whole current of modern decisions is in favor of the right of appeal and review?

The following cases sustain the right of appeal in cases of contempt: *Commonwealth v. Newton*, 1 Grant (Penn.), 453; *Ex parte Rowe*, 7 Cal. 175; *Ex parte Langdon*, 25 Vt. 680; *Regina v. Paty*, 2 Ld. Raym. 1106, 1115; Coke on Lit. 288; *Bickley v. Commonwealth*, 2 J. J. Marsh. 572; *Stuart v. People*, 3 Scam. 395; *Vertner v. Martin*, 10 Smede & Mar. 103; *Baltimore & Ohio R. R. Co. v. City of Wheeling*, 13 Grat. 40;

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Ex parte Yates, 6 Johns. 337; *M Credie v. Senior*, 4 Paige, 387; *The People v. Craft*, 7 Paige, 325; *Albany City Bank v. Schermernhorn*, 9 Paige, 372; *The People v. Farman*, 2 Am. Law Rev. 353; *The People v. Hackley*, 24 N. Y. 74; *Pitt v. Davison*, 37 N. Y. 235; *Vilas v. Burton*, 4 Am. Law Reg. 168; *In re Hummell*, 9 Watts, 416.

The most of the above cases held that a person who has been adjudged guilty of contempt by a competent court, and imprisoned, cannot be discharged upon a writ of *habeas corpus*.

WOODWARD, J., in *Commonwealth v. Newton*, *supra*, says: "There is no ground to doubt our jurisdiction in this case, because this is a proceeding for contempt, which is a substantive criminal offense, and of which we take cognizance on *certiorari* or writ of error, in the same manner and to the same extent we do of any other public offense, for which the courts subject to our appellate jurisdiction assume to punish a citizen. Our jurisdiction results out of the constitution of this court. It is not self-imposed, but is forced upon us by the legislative imposition of powers and duties under which we sit, and is one of the securities of the liberty of the citizen. The courts having a limited jurisdiction in contempts, every fact found by them is to be taken as true, and every intendment is to be made in favor of the record, if it appears to us that they proceeded within and did not exceed their jurisdiction; but for the purpose of seeing that their jurisdiction has not been transcended, and that their proceedings, as they appear of record, have been according to law, we possess and are bound to exercise a supervisory power over the courts of the commonwealth."

In *The People v. Hackley*, the court held that where it appears by return on *habeas corpus*, that the commitment was a contempt, plainly and specially charged in the commitment, ordered by a court of competent jurisdiction, he shall be remanded into the custody in which he was found. The court, however, say:

"But this rule is of course subject to the qualification, that

the conduct charged as constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated of it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so."

It is said by the Supreme Court of California, *supra*, "The main difficulty in reference to the right of this court to review such decision arose under the four hundred and ninety-third section of the practice act, which provides that 'the judgment and orders of the court or judge in cases of contempt shall be final and conclusive.'

"This language of the statute would at first view seem to be very express, and conclusive. But in arriving at the true intention of the law, we must look to all portions relating to the same matter, and also the general drift and spirit of our system. The framers of our constitution intended to produce an entire system, harmonious and efficient in all its features. The same rights were intended to be secured to all. The same judicial construction of the law was equally contemplated. For this purpose our Supreme Court is created by the constitution.

"If then, in a certain class of cases, deeply affecting the liberty of the citizen, even to the extent of perpetual imprisonment, the Supreme Court cannot review the decisions of inferior courts, it would leave our judicial system without unity and efficiency, and make the liberty of the citizen virtually subject to the discordant decisions of all the county and district courts of the State."

The Supreme Court of Pennsylvania, in the case of *Hummel*, 9 Watts, 430, say: "If this be so in civil proceedings, there is a still stronger reason why the proceedings of an inferior tribunal for a contempt of court should be subject to the revisory power of this court, to see that they have not overstepped their jurisdiction, and exercised this summary power in a case not warranted by the law. For this is always

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ranked as a criminal proceeding, and the general common law rule is, that a *certiorari* lies from the king's bench to remove all criminal proceedings of an inferior court, unless there be a special exemption, or unless where, after conviction, the party is put to his writ of error."

In *Stuart v. The People*, 3 Scam. 395, the Supreme Court of Illinois say:

"Contempts are either direct, such as are offered to the court while sitting as such, and in its presence, or constructive, being offered, not in its presence, but tending, by their operation, to obstruct and embarrass, or prevent, the due administration of justice. Into this vortex of constructive contempts have been drawn, by the British courts, many acts which have no tendency to obstruct the administration of justice, but rather to wound the feelings or offend the personal dignity of the judge, and fines imposed, and imprisonment denounced, so frequently, and with so little question, as to have ripened, in the estimation of many, into a common law principle; and it is urged, that inasmuch as the common law is in force here, by legislative enactment, this principle is also in force. But we have said, in several cases, that such portions only of the common law as are applicable to our institutions and suited to the genius of our people, can be regarded as in force. It has been modified by the prevalence of free principles and the general improvement of society; and while we admire it as a system, having no blind devotion for its errors and defects, we cannot but hope that in the progress of time it will receive many more improvements, and be relieved from most of its blemishes. Constitutional provisions are much safer guarantees for civil liberty and personal rights than those of the common law, however much they may be said to protect them."

In our opinion it is fully and completely demonstrated by the foregoing authorities, that a proceeding for contempt is a criminal proceeding, and our statute, in plain and express language, gives an appeal to this court from all final judgments in criminal cases; and we are, therefore, of the opin-

ion that the appellant in the case under consideration had a right of appeal, and that this right of appeal confers on this court jurisdiction to examine and review the judgment of the court below.

In coming to this conclusion we have not been unmindful of the consequences that are likely to result. We admit to the fullest extent that the power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances and preserve the respect due to the dignity of the court, and the principal means of doing that is by immediate punishment. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial.

Where the contempt is committed in the presence of the court, and the court acts upon view and without trial, and inflicts the punishment, there will be no charge, no plea, no issue, and no trial; and the record that shows the punishment will also show the offense, and the fact that the court had found the party guilty of the contempt; on appeal to this court, any fact found by the court below would be taken as true, and every intendment would be made in favor of the action of the court. The members of this court do, and must, have as strong motives and as earnest a desire to preserve the power and dignity of the judiciary, and protect the courts from insult and molestation, as the circuit, common pleas, and criminal judges can possibly have. Besides, the right of appeal does not deprive the inferior courts of the power to inflict immediate and summary punishment for any contempt, for the reason that being a criminal proceeding, an appeal will not stay or supersede the judgment of the lower court, and such judgment will remain in full force until reversed by this court.

When the contempt is not committed in the presence of the court, the proceeding must be commenced either by a rule to show cause or by attachment, and the party accused will have the right to be heard in his defense; and the evi-

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dence offered on the trial, and all the other steps, can be put upon the record by a bill of exceptions, and the questions involved can be fairly presented to this court for examination and review, and thus enable this court to determine whether the acts committed amounted to a contempt, and whether the lower court had exceeded its jurisdiction in the punishment inflicted.

Having arrived at the conclusion that we possess jurisdiction to review the judgment of the court below, it remains for us to determine whether the conduct of the appellant constituted a contempt of court, and whether the court acted within or exceeded its jurisdiction in the judgment rendered. The power to punish for contempt is, by plain and undoubted language, conferred upon the courts of this State by statute. Section 13 of the act providing for the organization of circuit courts provides, that "the said circuit courts, respectively, shall have full authority to administer all necessary oaths, and to punish, by fine and imprisonment, or either, all contempts of their authority and process in any matter before them, or by which the proceedings of the court, or the due course of justice, is interrupted." 2 G. & H. 8.

By section 28 of the act providing for the organization of the common pleas, the same power is conferred upon such courts. 2 G. & H. 26.

The above section embraces both direct and constructive contempts. The contempt is direct when committed before and in the presence of or so near to the court as to interrupt the proceedings of the court. The refusal of a witness to testify, the insolence and insubordination of an attorney or other officer of court, fighting, making a noise or confusion in or so near to the court as to interrupt the business of court, may be mentioned as some of the acts that amount to a direct contempt of the court; and such contempts are usually punished in a summary manner, without evidence, but upon the view and personal knowledge of the presiding judge.

Contempts are constructive when they are committed not

in the presence of the court, and when they tend, by their operation, to interrupt, obstruct, embarrass, or prevent the due administration of justice. The refusal of a witness or juror to obey the process of the court; the refusal of a citizen, when lawfully called upon by an officer, to assist in executing a warrant or other lawful process; the refusal of a person, against whom an officer has a warrant, to submit to an arrest, or the escape of such person after arrest; the attempt on the part of third persons to prevent an arrest or to procure an escape; any attempt to bribe, intimidate, or otherwise influence a juror; any attempt to threaten or intimidate a person from instituting or defending any action; to counsel, advise, or persuade a witness or juror not to attend court when lawfully summoned; to threaten, intimidate, persuade, or bribe, or offer to bribe any witness to testify to anything that is not true, or to suppress or withhold the truth; the forcible abduction of a witness or party with the view or for the purpose of preventing such witness from testifying in any cause pending in any court, to prevent such party from prosecuting or defending any action pending in any court, may be mentioned as some of the cases of constructive contempts.

The proceeding against a party for a constructive contempt must be commenced by either a rule to show cause, or by an attachment, and such rule should not be made or attachment issued, unless upon affidavit specifically making the charge. When the rule or attachment has been served, the person accused has the right to be heard by himself and counsel. If the contempt is admitted, the court may render judgment on such admission; but if the defendant denies that he committed the acts complained of, or insists that they do not constitute a contempt, then the court should hear the evidence, and upon that determine the guilt or innocence of the party.

The decision of the question of whether the appellant was guilty of a contempt will mainly depend upon the legal *status* of Emily I. Risk, in reference to the case that was pending

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in the Jefferson Circuit Court, wherein she, by her next friend, was plaintiff, and the appellant was defendant.

First. Was she the real party, and did she have the right to control the action? or was Emeline Risk, the next friend, the real party, and did she have the right to control the action?

At common law, an infant could neither sue nor defend except by guardian. By the statutes of West. 1, 3 Edw. I., ch. 49; and West. 2, 13 Edw. I., ch. 15, he is authorized to sue by *prochein ami*.

Sections 10 and 11 of our code provide as follows:

"Sec. 10. When an infant shall have a right of action, such infant shall be entitled to maintain suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age."

"Sec. 11. Before any process shall be issued in the name of an infant, who is a sole plaintiff, a competent and responsible person shall consent in writing to appear, as the next friend of such infant, and such next friend shall be responsible for the costs of such action, and thereupon process shall issue as in other cases; but where it shall appear to the court that such next friend is incompetent, or irresponsible, the court may remove him, and permit some suitable person to be substituted, without prejudice to the progress of the action." 2 G. & H. 42 and 43.

Section 24 of the code (2 G. & H. 55) provides, that "any unmarried female may prosecute as plaintiff an action for her own seduction, and may recover therein such damages as may be assessed in her favor."

The law is thus stated by Tyler in his valuable book on Infancy and Coverture, p. 192: "An action by an infant must be prosecuted by guardian or *prochein ami*, but always in the name of the infant; and the suit is the infant's to all intents, the same as though he was of full age." Again: "Although the action is prosecuted by a *prochein ami*, or guardian, the *prochein ami*, or guardian, cannot be considered a

party to the suit. *Sinclair v. Sinclair*, 13 Mees. & Wels. 640, 646; *Brown v. Hull*, 16 Vt. 673:"

Our statute and the above authority make the infant the party. The *prochein ami* is made, by statute, liable for the costs of the action. It is held by this court, in *Develin v. Riggsbee*, 4 Ind. 464, that an infant female might release a right of action for a breach of promise of marriage.

It was held by this court, in *Gavin v. Burton*, 8 Ind. 69, that an infant father of a bastard child might settle and compromise with the mother, and thus make provision for the support of such child. It was held by this court, in *Gimbel v. Smidth*, 7 Ind. 627, that an infant female might compromise and release a right of action for her own seduction, but that she could not release her mother's right of action for the seduction of her daughter, the mother being a widow.

It is quite obvious to us that Emily I. Risk was the plaintiff in said action, and that she might or might not, as seemed best to her, attend court and prosecute the action.

Under our statute, she was a competent witness in her own behalf, and the defendant could have made her his witness, and could have had her subpoenaed and forced her attendance by attachment; but we know of no law, written or unwritten, or any practice of court, that would authorize a party to have himself or herself subpoenaed as a witness to testify in his or her own favor, and thus confer upon such person the rights and protection that are afforded to witnesses. The appellant could not, therefore, be adjudged guilty of a contempt of court in obstructing its process, or in abducting a witness.

We must, therefore, regard Miss Risk as the plaintiff in said cause. If the appellant induced her by threats or intimidations to leave court, or abducted her against her will and consent, he was guilty of a flagrant contempt of court; but, if, on the other hand, she went away of her own free will and accord, and without any persuasion or coercion on his part, the fact that he aided and assisted her, at her own request, to get away, would not make him guilty of any contempt.

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We do not think that the evidence on the trial showed that Miss Risk had been abducted. The appellant went to the house where she was staying and inquired for Mr. Black, and being told that he was not home, he left. She voluntarily left the house and went down to where the appellant and his friend were standing, and got into the buggy and went off with appellant. It is true that one witness testified that the two men took her by the arms and walked with her, but there was no evidence of any resistance or outcry on her part, as there would have been if she was being taken away by force, and against her will.

We are of the opinion that the court erred in finding the appellant guilty of contempt on the evidence. We are also of the opinion that the court erred in refusing the application of the appellant to set aside the judgment and admit him to bail. The affidavits of Miss Risk and the appellant conclusively showed there had been no abduction and no contempt.

We are also of the opinion that, conceding that the appellant had been guilty of a contempt, the judgment of the court was erroneous. The imprisonment was to continue until he produced in court the body of Emily I. Risk, and paid the costs, unless sooner discharged. There was nothing to show that she was under his power, or that he could comply with the order of the court. The imprisonment for contempt must be for a certain and definite time, or must expire on the performance of a condition. The court, by its adjournment and imprisonment of the appellant, rendered it impossible for him to produce in court the body of Miss Risk until the next term of the court. Besides, the costs were not ascertained and taxed so that they could be paid, and he discharged. *Albany City Bank v. Schermerhorn*, 9 Paige, 372. An imprisonment by a legislative body terminates with the adjournment. *Anderson v. Dunn*, 6 Wheat. 204; PIRTLE, Chancellor, in *Ex parte Alexander*, 2 Am. Law Reg. 44, says:

"Is it necessary that the courts in this country should have power to commit until further order of the court? I

cannot find it. I can see no call for it. I can see danger in it; and the law should not make danger where there is no necessity. A freeman should never, by the laws of freemen, be placed in such dreary uncertainty of imprisonment as that when he inquires of the 'law of the land,' it cannot tell him when it shall end. No absolute power lives in this country. It cannot exist in a republic. Suppose the court should adjourn without having made any further order, the consideration of the case is cut off at once and entirely until the next term. So he must be left without any authority of the judiciary even to mediate his case. And a person committed for contempt cannot be bailed."

There is another objection to the proceedings in this case. When the contempt is direct, the court acts upon view; but if it is constructive, this cannot be done. The attachment was issued upon the verbal statement of counsel, and of some person whose name is not given. This was wrong. The court should never enter a rule to show cause or order an attachment, until an affidavit of some responsible person was filed, specifying the acts committed by the person accused of the contempt.

The case of *The State v. Tipton*, 1 Blackf. 166, and all subsequent cases that hold that an appeal will not lie to this court in cases of contempt, are upon that point overruled.

The judgment of the court below is in all things reversed, and the cause is remanded with directions to the court below to discharge the defendant from imprisonment and from further proceedings under the said charge.

H. W. Harrington and *C. A. Korbly*, for appellant.

B. W. Hanna, Attorney General, for the State.

Lewis v. Lewis.

LEWIS v. LEWIS.**DIVORCE.—Pleading.****APPEAL** from the Elkhart Common Pleas.

WORDEN, J.—The appellee obtained a divorce from the appellant in the court below, in which court the appellant did not appear.

Two errors are assigned: first, that the court had no jurisdiction of the defendant below; and second, that the complaint did not state facts sufficient, etc. The first objection has been obviated by an amended transcript sent up in return to a *certiorari*.

The transcript has also been amended in the same way in respect to the statements in the complaint. As now shown, the complaint stated, as the ground of divorce, that in the month of November, 1864, the plaintiff intermarried with the defendant, and lived with her by virtue thereof, until some time in the month of June, 1865, when the defendant, without cause or provocation on his part, abandoned and deserted the plaintiff, since which time she has been living in adultery with one ———, wherefore, etc. The complaint was filed in March, 1868. If the complaint does not sufficiently charge adultery to make that an available ground for divorce because the party with whom it was committed is not stated, nor any reason given for the omission; still the abandonment is sufficiently charged, and appears to have been continuous from the time it took place, up to the commencement of the suit, for it is alleged that since the abandonment she has been living in adultery. This, in the common acceptation, means that she had been thus living in adultery ever since the abandonment; and if so, the abandonment must have been continuous. We think the complaint was sufficient.

The judgment below is affirmed, with costs.

J. A. Stein, for appellant.

A. S. Blake, R. M. Johnson, and H. D. Wilson, for appellee.

HAYS v. BRANHAM and Others.

CONTRACT.—Assignment.—Where a written promise was given to pay to a railroad corporation a certain sum of money, when its road should be completed through a particular county; *provided*, it should run through lands owned by A. in a designated locality;

Held, that such contract was assignable without indorsement, and the purchaser might maintain an action thereon in his own name.

PLEADING.—Performance of Condition.—In a suit on such contract, an averment, "that accepting and acting on said agreement and subscription, said company did construct and build such railroad, and that the same was so far completed in accordance with said contract and agreement that, on" etc., "the same was ready for running cars thereon through said county," was held not a sufficient averment of performance of the conditions of the contract to entitle the plaintiff to recover.

SAME.—Evidence.—Where the maker of such written contract, in a suit against him for its enforcement, answered that his agreement contained other stipulations and conditions as set out in a conditional subscription paper made a part of the answer, executed by others, to which he was not a party; and that the plaintiff had not performed said stipulations and conditions;

Held, that a demurrer was properly sustained to the answer, nor could such evidence be admitted on the trial.

Held, also, that evidence that the road did run through the designated lands of A. could not be admitted under the averments of the complaint.

APPEAL from the Owen Common Pleas.

DOWNEY, C. J.—Branham, Allen, and Fletcher sued the appellant on the following instrument:

"I promise to pay to the Indianapolis and Vincennes Railroad Company five hundred dollars, when their said road shall have been completed through Owen county, Indiana; provided, the said road shall run through the lands owned by Malinda Hays, in section three, township ten, north of range three west, in said county.

Feb. 2d, 1866.

LEWIS M. HAYS. \$500."

It is alleged that the railroad company assigned the instrument to Burnside, who agreed to build the road, and that he assigned it, with the approbation of the company, to the plaintiffs. The company and Burnside are made defendants to answer as to the assignments.

The allegation in the complaint of compliance with the

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condition on which the money was to be paid, is as follows: "And the plaintiffs aver that, accepting and acting on said agreement and subscription, said company did construct and build such railroad, and that the same was so far completed, in accordance with said contract and agreement, that on the 20th day of July, 1869, the same was ready for running cars thereon through said county."

The defendant, Hays, demurred to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. His demurrer was overruled, and he excepted, and this is the first error assigned.

We think this demurrer should have been sustained. The allegation of compliance with the conditions on which the money was promised is insufficient. Even with reference to the completion of the road through the county, the allegation is very cautiously made. It was "so far completed," etc. But as to its being completed through the lands of Melinda Hays, there is no allegation whatever. It is very clear that the road might be completed through the county, and yet not through the lands of the party named. The citation of authorities on this point is not considered necessary.

Another objection to the complaint made by counsel is, that the instrument in question was not assignable. We think otherwise. When Burnside undertook to build the road for the company, we think the company might legally transfer the obligation to him, and that he might recover when the condition had been complied with. It could not be material to the party promising to pay, whether he paid the money to the company, and the company paid it to the contractor, or whether he paid it to the contractor, as the assignee of the obligation, so that the road was made according to contract. The same may be said of the second assignment of it, that from Burnside to the plaintiffs. The instrument is one which is assignable by indorsement; 2 G. & H. 658, sec. 1; and, we think, was assignable without indorsement, so as to enable the owner of it to sue according to 2 G. & H. 38, sec. 6. See *Smith v. Hollett*, 34 Ind. 519.

The defendant, Hays, then answered. The first paragraph was a general denial. In the second he alleged that the writing which he executed contained other stipulations, and was subject to other conditions, to wit, that the said company should complete her road through said county, and have the same ready for the running of the cars through said county, and that such road should be permanently located across the ridge north-west of Gosport, and down the side of the bluff below Gosport, and on the north side of the Spencer and Gosport state road, as far as practicable, before said sum named in said writing should become due or payable to said company, or said instrument binding on the defendant, which said stipulations are as follows :

“ INDIANAPOLIS AND VINCENNES RAILROAD.

ARTICLES OF SUBSCRIPTION.

“For and in consideration of the benefits that the public in general, and we in particular, will derive from the construction of a railroad from Indianapolis to Vincennes, we, the undersigned, agree to give, donate, and pay to the Indianapolis and Vincennes Railroad Company the amount annexed to our names respectively, when said railroad company shall have completed said railroad through Owen county, the same to be collectible without relief from valuation or appraisement laws.

“December 14th, 1865.

“We sign the above subscription upon the express condition that said railroad shall be permanently located across the ridge north-west of Gosport, and down the side of the bluff below Gosport, and on the north side of the Spencer and Gosport state road as far as practicable.”

Signed :

“H. Wampler, \$4,500; A. H. Pettie, \$500; J. E. Goss, \$1,500; Fowler & Meek, \$300; J. Ittenbach, \$300; J. Q. Dunning, \$100; T. P. Surber, \$100; Wm. Alexander, \$200; J. W. Alexander, \$300; B. F. Hart, \$50; V. E. Williams, \$50; P. Williams, \$200; James Goss, \$50; A. Williams,

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\$100; Samuel Alverson, \$50; J. W. Branch, \$500; Hamilton Hays, \$250."

"I promise to pay the Indianapolis and Vincennes Railroad Company five hundred dollars, when their said road shall have been completed through Owen county, Indiana, provided the said road shall run through the lands owned by Malinda Hays, in section three, township ten, north of range three west, in said county.

"February 2d, 1866.

(Signed)

LEWIS M. HAYS. \$500."

That said railroad has not been permanently located across the ridge north-west of Gosport, and down the side of the bluff below Gosport, and on the north side of the Spencer and Gosport state road as far as practicable, but has been permanently located and made, and is now in operation as a line of railroad, south-west of Gosport, and on the south side of the Spencer and Gosport state road.

That it was practicable to have located and made said railroad north-west of Gosport, across said ridge and down the side of the bluff below the town of Gosport, on the north side of the Spencer and Gosport road; wherefore, etc.,

The plaintiff demurred to the second paragraph of the answer, on the ground that it did not state facts sufficient to constitute a defense to the action. The demurrer was sustained, and the defendant excepted, and this is the second error assigned.

We think this demurrer was properly sustained. We regard the defendant's obligation as separate from the preceding agreements. When the railroad shall have been completed through Owen county, Indiana, and shall run through the lands owned by Malinda Hays, described as in the instrument, the defendant will have received all that he contracted for as the consideration for which he agreed to pay the five hundred dollars.

The case was tried on the issue formed by the general denial, by the court, and there was a finding, and, after a

motion for a new trial had been made and overruled, there was judgment for the plaintiffs.

The plaintiffs on the trial produced a paper book.

The first page thereof was blank, except the following:
"No. 17."

Upon the second page the following was printed:

"INDIANAPOLIS AND VINCENNES RAILROAD.

ARTICLES OF SUBSCRIPTION.

"For and in consideration of the benefits that the public in general, and we in particular, will derive from the construction of a railroad from Indianapolis to Vincennes, we, the undersigned, agree to give, donate, and pay to the Indianapolis and Vincennes Railroad Company the amounts annexed to our names, respectively, when said railroad company shall have completed said railroad through Owen county, Indiana, and have the same ready for the running of the cars through said county; the same to be collectible without relief from valuation or appraisal laws.

"December 14, 1865."

Following which, on the same page, there was the following, in writing:

"We sign the above subscription upon the express consideration that".

Upon the third page was the following, in writing:

"said railroad shall be permanently located across the ridge north-west of Gosport, and run down the side of the bluff below Gosport, and on the north side of the Spencer and Gosport state road, so far as practicable."

Signed:

"Hezekiah Wampler, \$4,500; A. H. Pettie, \$500; J. E. Goss, \$1,500; J. W. Branch, \$500; Hamilton Hays, \$250."

On the fourth page was written the following:

"Fowler & Meek, \$300; John Ittenbach, \$300; James Q. Dunning, \$100; Samuel Alverson, \$50; And. J. Glover, \$500; Thomas P. Surber, \$100; Wm. Alexander, \$200; James Goss, \$50; J. W. Alexander, \$300; B. F. Hart, \$50;

Hays v. Branham and Others.

V. E. Williams, \$50; P. Williams, \$200; A. Williams, \$100."

On the fifth page is the following, in writing:

"I promise to pay to the Indianapolis and Vincennes Railroad Company five hundred dollars, when their said railroad shall have been completed through Owen county, Indiana; provided, the said road shall run through the lands owned by Malinda Hays, in section three, township ten, north of range three west, in said county.

"February 2d, 1866. LEWIS M. HAYS. \$500."

On the sixth page is the following:

"UNITED STATES INTERNAL REVENUE COLLECTOR'S OFFICE,
SEVENTH DISTRICT INDIANA,
TERRE HAUTE, December 10th, 1869.

I hereby certify that this instrument, composed of books from 1 to 25, inclusive, has been stamped with a five cents internal revenue stamp, affixed and cancelled by me (one stamp on each book or sheet), at the request of William M. Franklin, Esq., attorney for I. & V. R. R., this 10th day of December, 1869. Penalty of \$50 on said entire contract collected, as required by letter of J. W. Douglas, Acting Com. Int. Rev. of December 2d, 1869.

SAM'L MAGILL, Collector."

There was also, on the same page, the impression in paper of said collector's seal. The bill of exceptions shows an internal revenue stamp on the following pages: the fourth and fifth.

The appellees offered in evidence only so much of the matter contained in said book as is found on the fifth page thereof, while the appellant insisted that all the matter contained in said book should be read in evidence.

The court permitted the appellees to read, in evidence, the matter found on page five of said book, and did not require them to read in evidence the other matter contained therein.

William M. Franklin testified as a witness for the appellees. His testimony showed that the Indianapolis and Vincennes Railroad Company had completed its railroad through Owen county, Indiana, and through the lands owned by

Malinda Hays, in section three, township ten, north of range three west, in said county, on the 20th day of July, 1869, ready to be run by the cars.

The appellant offered to read in evidence the matter above set forth, contained in the book mentioned, not offered in evidence by the appellees. The court, upon the appellees' objection, declined to permit it to be read in evidence.

The evidence of Franklin, that the road was made through the lands of Malinda Hays, was admitted over the objection of the defendant.

We have already decided that the contract of the defendant was not connected with the preceding stipulations or agreements. Hence it was proper for the court to allow the matter on the fifth page, being that agreement, to be read in evidence without requiring the plaintiff to read the entries on the other pages; and it was, for the same reason, proper to refuse to allow the defendant to read the other entries.

The question argued as to the revenue stamp is immaterial. The paper was valid without a stamp. But it seems to have been stamped to the satisfaction of the revenue officer, and the penalty paid.

The evidence that the railroad had been made through the lands of Malinda Hays was wrongly admitted, as there was no allegation of that fact in the complaint.

The judgment is reversed, with costs, and the cause is remanded.

W. R. Harrison and W. S. Shirley, for appellant.

T. A. Hendricks, O. B. Hord, A. W. Hendricks, and W. M. Franklin, for appellees.

Hebel v. Scott.

HEBEL v. SCOTT.

PRACTICE.—*Motion to Correct Judgment.*—*Nunc Pro Tunc Entry.*—*Replevin.*

In a suit to recover an article of personal property of the alleged value of three hundred dollars, with damages for its detention, upon an issue formed by an answer of general denial, there was a finding generally for the plaintiff, and, among other things, that the property was of the value of two hundred dollars and the damages nine dollars, and the clerk entered judgment only for the recovery of the property and damages, on the 3d day of December 1869, and on the 27th day of the May term, 1870, said term having commenced on the 9th of May, the plaintiff moved the court to correct the judgment so that the plaintiff should recover the value of the property in case a delivery could not be had, and the plaintiff proved notice to the defendant of the motion on the 29th day of April, 1870, and the defendant moved to set aside the service, first, for want of a proper summons; second, because there was no proper service; third, because the complaint was not filed ten days before the first day of the term. The court refused to set aside the service.

Held, that this ruling was correct.

Held, also, that a demurrer to the motion to correct the judgment was properly overruled.

SAME.—*Pleading.*—*Evidence.*—The defendant then answered, first, a general denial; second, that the value of the property was not in issue, and no evidence as to value was offered except to determine the jurisdiction of the court; third, that the plaintiff elected to take judgment only for the recovery of the property, and so directed the clerk; fourth, that there was no evidence of the value of the property introduced, and if there had been, defendant would have proved it to have been of little or no value. The second, third, and fourth paragraphs of the answer were stricken out.

Held, that this action of the court was correct, as on such motions special pleadings are not contemplated, and the disposition of the motion is to be summary, and the defendant cannot controvert the facts already found and entered upon the record. It might have been proved by competent evidence, that the plaintiff had, at the time the judgment was entered, elected to take it in the form in which it was written, and so directed the clerk; such proof would have defeated the motion.

APPEAL from the Cass Circuit Court.

DOWNEY, C. J.—The appellee sued the appellant, in the Cass Circuit Court, to recover a piano, of the alleged value of three hundred dollars, with damages for its detention. Upon an issue formed by the general denial, there was a trial by a jury, and finding, generally, for the plaintiff, and specially, among other things, that the value of the piano

was two hundred dollars, and the damages for its detention nine dollars.

The clerk, in entering the judgment, provided that the plaintiff should recover the property and the damages, but did not state in the judgment that the plaintiff should recover the value of the piano in case a delivery of it could not be had, as authorized by 2 G. & H. 219, sec. 374. The judgment was rendered on the 3d day of December, 1869.

At the May term of said court, the plaintiff moved the court to enter this latter part of the judgment, *nunc pro tunc*, and produced evidence of the service of notice of such intended motion on the defendant. The notice was served on the 29th day of April, 1870. The May term of the court commenced on the 9th day of May, 1870. The motion was made on the 27th day of the term, being the 8th day of June, 1870.

The defendant moved to set aside the service, because, 1. There had been no proper summons issued. 2. There had been no proper service. 3. The complaint was not filed ten days before the term of the court. This motion was overruled.

This ruling was correct. Such motions are not required to be filed ten days before court, and no summons is necessary. A notice is all that the law or practice requires.

The defendant then demurred to the motion, and his demurrer was rightly overruled. He then filed an answer in four paragraphs. The first was a general denial. The second alleged that the value of the piano was not in issue in the first suit, and no evidence was offered in reference to it, except simply to determine the jurisdiction of the court. The third stated that the plaintiff, by her counsel, elected to take the judgment simply for the recovery of the piano, and so directed the clerk to enter up the same. The fourth affirms that the plaintiff called no witnesses to prove the value of the piano, and that the verdict of the jury on the question of the value was rendered without proof and simply on the suggestion of plaintiff's counsel; that if the plaintiff had

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put in issue the value, he was prepared to prove, and would have proved, that it was of little or no value; and that great injustice would be done him, if the judgment was now reformed so as to render him liable to the plaintiff for the amount assessed by the jury.

The second, third, and fourth paragraphs of the answer were stricken out, on motion of the plaintiff.¹

We see no error in this. In such motions as this, special pleadings are not contemplated. The application is to the court, to be disposed of in a summary manner. In this case the facts on which the judgment asked for was to be rendered had already been found by the jury. It was not competent for the defendant to controvert the facts already found and entered upon the record.

It may be questionable whether a proper practice in such a case would allow the defendant to plead even the general denial. The bill of exceptions says that, on the trial, the defendant offered to prove that the value of the piano was not in issue nor made an issue by the evidence in the former suit, which evidence was rejected by the court.

The complaint in the original action, as we have seen, alleged the piano to be of the value of three hundred dollars. The answer was a general denial. This made an issue upon the value. The jury found the value to be two hundred dollars. To allow the defendant now to introduce the evidence offered, would be a flat contradiction of the record in the original case, and cannot be allowed.

The defendant also offered to prove that in the former suit no evidence was offered of the value of the piano, and that the plaintiff elected to take judgment for possession, and that the piano was not of the value of two hundred dollars. This evidence was also rejected.

We cannot say that this ruling of the circuit court was wrong. If an offer had been made to prove, by competent evidence, that the plaintiff had, at the time of the rendition of the judgment, elected to take the judgment in the form in which it was entered, and had directed that it should be

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so entered, we think such evidence would have been admissible; for if the plaintiff got such a judgment as he desired, and as he elected to take, the court could not well listen to his complaint that, by the misprision of the clerk, he did not get all that he was entitled to. But such an offer was not made in this case. The offer was to prove three different things, two of which we are clear that the defendant had no right to prove. The part of the offer relating to the form of the judgment is too uncertain to justify the reversal of a judgment. It was an offer to prove that the plaintiff "elected to take judgment for possession." But it was proposed to prove that he elected to dispense with the judgment for the value of the property.

We are unable to see any merit in the defense in this case. It was the plaintiff's right to have the judgment as it was finally rendered. The law so provides, and the jury found the facts on which the judgment could properly be so rendered.

The judgment is affirmed, with costs.

S. T. McConnell and M. Winfield, for appellant.

Stuart J. McConnell,
Maurice Winfield.



CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1871, IN THE FIFTY-SIXTH
YEAR OF THE STATE.

POTTER and Others *v.* SMITH and Others.

ADMINISTRATOR'S SALE.—*Purchase by Administrator.*—*Statute of Limitations.*

Where an action is brought by heirs to set aside a public sale of real property, made by an administrator under the order of the court, on the ground that he was the real purchaser of the property in the name of another party, the law does not grant the relief because the act is necessarily fraudulent, but because it is poisonous in its consequences; and therefore the statute limiting actions "for relief against frauds" does not apply.

SAME.—Such a suit is not an action for the recovery of real property; and therefore the limitation to twenty years does not apply.

SAME.—*Limitation of Fifteen Years.*—Such a suit, being embraced by no other statute, comes within section 212, 2 G. & H. 160, and must be brought within fifteen years.

PLEADING.—*Statute of Limitations.*—Where a statute of limitations contains exceptions, it must be pleaded, to avail the defendant, unless the complaint on its face shows that the plaintiff is barred, notwithstanding the exceptions.

ESTOPPEL.—*Heirs.*—*Administrator.*—Knowledge by the heirs of the purchase by the administrator, and their allowing him without objection to make valuable improvements, does not estop them. At most, he must be satisfied if he be repaid on the resale of the property.

APPEAL from the Knox Circuit Court.

WORDEN, C. J.—This was an action by the appellees, who were the heirs at law of Samuel Caruthers, deceased, against

36	231
126	509
127	444
36	231
134	535
135	508
36	231
137	486
138	76
139	75
139	554
36	231
141	327
141	674
36	231
146	633
36	231
150	216

the appellants, who were heirs at law and devisees of George W. Potter, deceased, and one Abraham Smith.

The complaint alleges, in substance, that on the — day of —, the said Samuel Caruthers died, leaving certain real estate therein described, situate in said county of Knox, and that said George W. Potter was duly appointed administrator of the estate of said Caruthers by the probate court of said county; that afterward, to wit, at the September term of said probate court for the year 1847, the said administrator, upon his petition, procured an order from said court for the sale of a portion of said real estate, which is described; that afterward, to wit, on the 2d day of October, 1847, said administrator made a pretended sale of said real estate ordered to be sold, to said Abraham Smith, for the nominal sum of two hundred dollars, and took his notes for one hundred dollars each therefor, payable in twelve and eighteen months; that afterward, to wit, at the November term of said court for the year 1847, the said administrator reported said sale to said court and procured a confirmation thereof; that afterward, at the March term, 1849, of said court, the said administrator reported to said court that said Smith had paid him in full for said land, whereupon the court ordered said administrator to execute a conveyance of the land to Smith; and that afterward, to wit, on the 15th day of June, 1849, the said administrator signed and acknowledged said conveyance and procured the same to be recorded in the recorder's office of said county; that at the September term, 1849, of said probate court, the said administrator, upon his petition therefor, procured an order from said court for the sale of other described portions of said lands of which said Samuel Caruthers died seized, and that afterward, to wit, on the 13th of October, 1849, the said administrator made a pretended sale thereof to said Abraham Smith for the nominal sum of two hundred and sixty dollars, and took his notes therefor, payable in six and twelve months; that afterward, to wit, at the December term, 1849, of said court said administrator reported said sale to said court, and procured a

confirmation thereof by the court; that afterward, to wit, at the June term, 1852, of said court, the said administrator reported to the court that he had received payment in full for said land, and the court ordered said administrator to execute a conveyance therefor to said Smith, and that afterward, to wit, on the 17th day of June, 1852, the administrator signed and acknowledged such conveyance and caused the same to be recorded in the recorder's office; that said pretended sales by said administrator were made for the purpose of enabling him to procure the title to the lands of which said Samuel Caruthers died seized; that said lands were struck off and sold to said Smith under an agreement between him and said Potter that said Potter should pay the purchase-money therefor, and that said Smith should convey said real estate to said Potter whenever thereafter requested; that said Smith never paid any part of said purchase-money, nor did he take possession of the land or claim any of the rents and profits thereof, or interest therein, under said sale; that the conveyances from said administrator to said Smith were never in fact delivered to said Smith, or in his possession, during the lifetime of said Potter, but were by said Potter caused to be recorded in the deed record of said county and retained in his own custody; that from the time said conveyances were made until the death of said George W. Potter, he kept the possession of the real estate of which said Caruthers died seized, and converted the rents and profits to his own use, and that during his life he declined to have said Smith convey to him said real estate, so as aforesaid sold by said Potter, but suffered the apparent legal title to remain in Smith for the purpose of deceiving the plaintiffs and defrauding them out of their interest and estate in the lands of which said Samuel Caruthers died seized; that said George W. Potter died in April, 1865, leaving a wife and children named as defendants; that afterward, to wit, on the 6th of February, 1866, the said Abraham Smith, without any consideration, and against the protests of the plaintiffs, executed to the widow and children of said Potter, deceased,

a conveyance purporting to convey to them all the lands struck off to him by said administrator as aforesaid; that the defendants, since the death of George W. Potter, deceased, have been in possession of the premises, and claim and pretend to own the same under the conveyances aforesaid. Prayer for general and special relief.

A demurrer was filed to the complaint, assigning for cause the want of sufficient facts, etc., but was overruled, and the defendants excepted.

The adult defendants answered in five paragraphs, as follows: first, general denial; second, "that the plaintiffs' cause of action accrued more than twenty years before the commencement of this suit, and that during all that time they had full notice thereof, and the land was sold by said administrator at public sale;" third, "that the plaintiffs' cause of action accrued more than fifteen years before the commencement of this suit, and that during all that time they had full notice thereof, and that the land was sold by said administrator at public sale;" fourth, "that said sales were made by said administrator at public auction, in all respects in accordance with the orders of said probate court, and the law in such cases made and provided, and without any effort or intent, on the part of said administrator, or said Abraham Smith, to take any advantage of said estate or the persons interested therein, but that all proper efforts were made to procure the highest bid for said land; and that, nevertheless, the said administrator was willing to pay more therefor than any other person, and for the sole purpose of securing the best price to the estate, and because the land was worth more to him than any other person, he had the same bid off for him and accounted to the court for the purchase-money; that all the heirs of said Caruthers, deceased, who were living at the time of the sale aforesaid, then, and before the sales, well knew these facts, but for the purpose of realizing the best price for the land, allowed the sales to be made as aforesaid, without making any objection thereto. That each sale was made at the time alleged in the complaint, and said

administrator immediately took possession of the premises, believing his title to be good and valid thereto, and made lasting and valuable improvements thereon by clearing the land and erecting valuable buildings, all of the value of five thousand dollars; that the plaintiffs, and those under whom they claim well knew all these facts, yet they did not, nor did any of them, make any objection or set up any claim to said real estate until the commencement of this suit."

The fifth paragraph of the answer, by way of counter claim, set up a claim to be reimbursed for the purchase-money and improvements and the taxes paid on the property. An issue of fact was taken on this paragraph.

Demurrers were sustained severally to the second, third, and fourth paragraphs of the answer, and the defendants excepted.

The infant defendants, by their guardian *ad litem*, filed an answer of general denial, and adopted as their own the answer of the adults.

The cause was submitted to the court for trial, who found for the plaintiffs, and ordered the lands to be sold, and the proceeds applied, first, to the payment of the costs therein; second, to reimburse the defendants for the purchase-money and interest and taxes paid on the premises, and the improvements made thereon, less the rents and profits thereof; and third, the residue, if any, to be paid to the plaintiffs, according to their respective interests.

No question is made in this court other than those arising upon the ruling of the court below upon the several demurrers.

The only objection urged to the complaint, except one that will be noticed hereafter, is the great lapse of time, after the transaction, before the bringing of this suit.

The appellants ask, "Do these facts, as stated in the complaint, show that the plaintiffs below proceeded within a reasonable time to set aside this sale?" The objection thus made is not, in our opinion, well taken.

Where lapse of time is relied upon as a defense to an

action, it must generally, under the code of procedure, be pleaded to the action, and be based upon some statute limiting the same. This may not have been the old rule in relation to many suits in equity, but by the code the distinction between actions at law and suits in equity is abolished; and it is provided that "there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights, or the redress of private wrongs, which shall be denominated a civil action." By the provisions of the code, the plaintiff is entitled, on bringing his action, to whatever relief either law or equity would have afforded him on the case made, before the distinction between them, in practice, was abolished. The two systems are blended together, and either legal or equitable rights are to be enforced in the "civil action" provided for. So, on the other hand, may the defendant set up to the action any matter of defense, either legal or equitable.

And as a part of the same system, the legislature provided for the "limitation of civil actions," and enacted that certain actions should be brought within certain specified times, and that "all actions not limited by any other statute shall be brought within fifteen years," but that in special cases where a different limitation is prescribed by statute, the provisions of that article should not apply. 2 G. & H. 156.

Under these provisions, it is quite clear that the legislature intended to fix certain and definite times within which all actions should be brought, whether they would, before the code, have been actions at law or suits in equity, and to leave nothing, in this respect, to doubt and uncertainty; the time limited depending upon the nature and purposes of each particular action. This view is sustained by the case of *Pflicher v. Flinn*, 30 Ind. 202. The distinction between bringing, and laying the foundation for an action must not be disregarded. There are cases where a man must act promptly and within a reasonable time, in order to be entitled to an action; e. g., if he finds himself defrauded in a contract, he may be required, in order to rescind, to act promptly on the discov-

ery of the fraud, and tender back to the other party what he has received, thereby placing him *in statu quo*, and demand a rescission; but having done all that is necessary to entitle him to a rescission, he may bring his action therefor at any time before he is barred by the statute. There is no preliminary step, that we are aware of, required to be taken by a *cestui que trust* before bringing an action, in order to entitle him to the relief sought in this case.

As a limitation is prescribed to the bringing of such actions, the question arises whether, where it appears by the complaint that the prescribed time has elapsed before the bringing of the action, the objection can be taken by demurrer. The statute contains various exceptions, as the disability of the plaintiff, non-residence of the defendant, etc.; and where such is the case, it is the settled rule that the statute, if relied upon, must be pleaded, unless, indeed, the complaint shows affirmatively that the plaintiff is barred, notwithstanding the exceptions. The reason is, that the case may be within some of the exceptions, and the plaintiff is not bound to anticipate the defense of the statute and show his case to be within the exception without knowing that such defense will be made. Upon the statute being pleaded, he may reply the exception. *Hanna v. The Jeffersonville Railroad Co.* 32 Ind. 113; *Perkins v. Rogers*, 35 Ind. 124.

The other objection to the complaint is, that it makes no case against the defendants, inasmuch as it appears that the sale of the property was made at public auction. In other words, it is claimed that an administrator may purchase at his own sale, and for his own benefit, where the sale is public, and not private.

This position is based upon the peculiar phraseology of section 233, p. 529 R. S. 1843, which provides, that in cases of private sale by an executor or administrator, the land shall not be sold for less than its appraised value, "nor shall such executor or administrator be permitted to become the purchaser." The same provision is incorporated into the revision of 1852. 2 G. & H. 511, sec. 88.

It is claimed that this provision, by expressly prohibiting the executor or administrator from purchasing at a private sale, by implication permits him to become the purchaser where the sale is public. The argument is plausible, but we cannot concur in the conclusion. We think that while the statute excludes the executor or administrator from purchasing where the sale is private, the law stands, as to public sales, as if there had been no legislation on the subject.

Mr. Justice STORY says, that "in all cases where a purchase has been made by a trustee on his own account, of the estate of his *cestui que trust*, although sold at public auction, it is in the option of the *cestui que trust* to set the sale aside, whether *bona fide* made or not." 1 Story Eq., sec. 322.

We think the demurrer to the complaint was properly overruled.

We come to the answer. This is clearly not an action to recover the possession of real estate, nor does it belong to the class of actions limited by the fifth clause of section 211 of the limiting statute to twenty years. Hence the second paragraph of the answer relies upon a clause of the statute inapplicable to the case, and the demurrer thereto, we think, was correctly sustained.

The third paragraph of the answer, we think, was good, and, therefore, the demurrer thereto should have been overruled. This conclusion is arrived at from the fact that there is no other provision than the one relied upon in this paragraph that is applicable to the case made in the complaint; and hence that the case is embraced in 2 G. & H. 160, section 212, which limits all actions, not limited by any other statute, to fifteen years.

We have considered whether the action was not limited by the section which fixes a six years' period, and embraces actions "for relief against frauds," but have concluded that the case does not fall within that section. That section embraces actual frauds, and possibly some cases of constructive frauds, but does not, as we think, embrace a case like the present, where the heir has a right to have the sale set aside

and the property again sold, not because the executor or administrator has been guilty of any fraud, but because he should be removed from all temptation to commit a fraud.

"The principle applies," says Judge STORY, in the section above cited, "however innocent the purchase may be in a given case; it is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to decide, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, and yet the party not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and, without showing essential injury, to insist upon having the experiment of another sale."

We quote, also, the following paragraph from 1 White & T. Lead. Cas. 161, as showing that the right of the *cestui que trust* does not depend upon any fraud imputed to the trustee:

"It matters not that there was no fraud contemplated and no injury done. The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it. It is one of those processes derived from the system of trusts by which a court of chancery turns parties away from wrong, and from the power of doing wrong, by making their act instantly inure in equity to rightful purposes. The cases are uniform in declaring that it matters not how innocent and *bona fide* and free from suggestion of fault the transaction may be, nor how harmless or even beneficial the interference of the trustee may have been, the trustee can never, by his own act, shake off the equity of the *cestui que trust* to have the benefit of all that he does in the scope of the trust; and the *cestui que trust* may come into equity as of course, and, without the imputation of either fraud or injury, ask for a re-sale of the property; and whether the property was or

was not worth more than the amount of the trustee's bid, is never inquired into."

The paragraph of the answer under consideration avers, as we think unnecessarily, that the plaintiffs had notice of the cause of action during all the fifteen years. The statute commences running when the cause of action accrues, and not when the plaintiff discovers it, except where the party liable to an action conceals the fact from the knowledge of the person entitled thereto; in which event, it runs only from the time of the discovery. *Pilcher v. Flinn, supra*; 2 G. & H. 162, sec. 219.

The fourth paragraph of the answer, we think, was bad, and the demurrer to it correctly sustained. From what has already been said, it is clear that this paragraph is bad, unless the facts set up estop the plaintiffs to seek the remedy to which they would otherwise be entitled. We do not think the matters set up in this paragraph, as against a *cestui que trust*, work such estoppel. If the *cestui que trust* permitted the trustee to buy the land without objection, and afterward to make valuable and lasting improvements thereon, as is alleged, it may be good ground in equity for reimbursing him therefor out of the first moneys arising from a resale of the property, as was ordered by the court; but when this is done he cannot equitably claim anything more. See *Bærum v. Schenck*, 41 N. Y. 182.

We have thus passed upon the questions involved in the several demurrers, and find no error except in the ruling upon the demurrer to the third paragraph of the answer. For that error the judgment below will have to be reversed.

The judgment below is reversed, with costs.

J. C. Denny, *G. G. Riley*, and *F. W. Viehe*, for appellants.
N. F. Malott and *T. R. Cobb*, for appellees.

TRAIN, Executor, v. GRIDLEY.

PLEADING.—*Trial Without Reply to Affirmative Answer.*—*Judgment Non Obstante Veredicto.*—Where a paragraph of an answer alleged payment, and another paragraph contained a set-off; and upon a demurrer being overruled to each paragraph, the entry of the clerk was as follows, “to which ruling the plaintiff excepts and files his reply in these words:” entitling the cause, “The plaintiff denies each and every allegation therein contained;” signed by attorneys for the plaintiff as such; and a trial by jury resulted in a finding for the plaintiff, and the jury in answer to interrogatories stated the amount due plaintiff and the set-off allowed; and the defendant thereupon moved for a judgment *non obstante veredicto*, because there was no sufficient reply to the answers; and the court sustained the motion and rendered judgment on the set-off for the defendant, without exception by the plaintiff;

Held, that the paper filed did not amount to a reply, but the defendant having gone to trial without moving for a judgment on the pleadings and without objection, waived a reply, and the court should have entered judgment on the finding for the plaintiff.

SAME.—*Bill to Review Judgment.*—Where a bill was subsequently filed to review this judgment, the complaint alleging the above facts;

Held, on demurrer, that the complaint was insufficient, as it showed no exception to the action of the court in rendering judgment for the defendant.

APPEAL from the Cass Circuit Court.

BUSKIRK, J.—The facts necessary to a proper understanding of the questions of law presented by the record in this cause are these:

William J. Gridley, the appellee, on the 24th day of March, 1866, commenced, in the Pulaski Common Pleas, an action against Jesse Millison, to recover for services, counsel, and advice, rendered as an attorney at law, at the special instance of the said Millison. Millison appeared to the action and filed an answer in three paragraphs; first, the general denial; second, payment; third, a set-off, with a bill of particulars. The plaintiff demurred to the second and third paragraphs of the answer, which was overruled, and an exception taken. The record contains the following entry: “Which demurrer is overruled by the court, to which ruling of the court the plaintiff excepts, and files his reply in these words, to wit:

36	241
124	498
36	241
170	298

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"William J. Gridley v. Jesse Millison. The plaintiff denies each and every allegation therein contained.

G. J. WICKERSHAM & A. W. REYNOLDS,
Att'ys for Plaintiff."

The cause was tried by a jury, resulting in a verdict for the plaintiff in the sum of ninety-seven dollars.

The jury also returned answers to the following interrogatories:

Question 1. "What is the value of the services rendered by Gridley for Millison, to recover which this suit is brought?"

Answer. "Two hundred and twenty-six dollars.

Question 2. "Has the same been paid?" Answer. "Not in full."

Question 3. "If not paid in full, how much do you find has been paid by Millison thereupon?" Answer. "One hundred and twenty-nine dollars."

The record then contains the following entry:

"William J. Gridley v. Jesse Millison. Defendant moves for a judgment of one hundred and twelve dollars against plaintiff, *non obstante veredicto*, because the allegations of his answer herein are admitted by the insufficiency of the paper purporting to be a reply, and because the same fails to contradict the answer herein.

RYAN & BALDWIN, Defendant's Attys.

"Which motion the court doth now sustain, and after computation the defendant remits all of the one hundred and twelve dollars verdict moved for, except seventy-five dollars, and the court doth now adjudge that the defendant is entitled to a judgment against the plaintiff upon the pleadings herein and upon said motion, for seventy-five dollars. And the plaintiff now prays an appeal from the said judgment so rendered against him to the Supreme Court, which is granted upon his filing bond in the sum of three hundred dollars, payable to defendant, with Gerard J. Wickersham as surety, and said bond is now filed in open court and approved. And the plaintiff prays leave to amend his reply herein, which the defendant objects to, and which is, therefore, re-

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fused; to which plaintiff excepts. It is, therefore, ordered and adjudged that the defendant, Jesse Millison, recover of and from the plaintiff, William J. Gridley, upon his set-off herein, the sum of seventy-five dollars and the costs in this behalf expended."

The appeal to this court was not perfected. On the 12th day of March, 1869, the appellee filed in the Pulaski Common Pleas a bill to review the said judgment. The complaint, after setting out the facts hereinbefore stated, and making a certified copy of the original suit a part thereof, proceeds to say:

"And the plaintiff shows to the court that there is manifest error of law appearing in the said proceedings and judgment, in this, to wit: Upon a trial of the issues presented in said cause by a competent jury, a verdict was returned into said court for the plaintiff for the sum of ninety-seven dollars, and the court erroneously and without any sufficient reason therefor, on the motion of the defendant, notwithstanding said verdict, rendered judgment against the plaintiff as above shown, when, according to law, the court should have rendered judgment for the plaintiff against the defendant upon the said verdict; wherefore the plaintiff prays for a review of the said judgment and proceedings, and that the same be reversed back and including the motion of the defendant for judgment in his favor, notwithstanding the said verdict, and that upon such reversal, judgment be rendered on said verdict in favor of said plaintiff, and for such other and further relief as may be proper.

HUFF & REYNOLDS, Att'ys for Pl'ff."

The defendant demurred to the complaint, which was overruled, and an exception taken. The defendant answered in two paragraphs: 1. The general denial. 2. That plaintiff had waived the alleged error complained of by failing to except to the ruling of the court in rendering judgment for the defendant *non obstante veredicto*.

The plaintiff demurred to the second paragraph of the answer, which was sustained, and the defendant excepted.

The death of Millison was suggested, and the appellant, as executor, was substituted as defendant. Upon the motion and affidavit of the defendant, the venue was changed, and, by the agreement of the parties, the cause was sent to the Cass Circuit Court.

The cause was, by the agreement of the parties, submitted to the court for trial. The court found for the plaintiff, and, over a motion for a new trial, rendered final judgment reversing the former judgment in favor of the defendant, and rendered a judgment in favor of the plaintiff upon the verdict of the jury.

The defendant moved in arrest of the judgment after it had been rendered, for the reason that the court erred in giving interest upon the verdict of the jury to the rendition of the last judgment.

Three questions are attempted to be raised. 1. Was the reply sufficient? 2. If not, was there anything to review in the absence of an exception to the decision of the court in rendering judgment for the defendant, *non obstante veredicto*? 3. Did the verdict in Gridley's favor draw interest from its rendition to the final judgment upon the bill of review? These questions will be considered in the order stated.

We are of the opinion that the paper filed did not amount to a reply. The pleader does not say that it is a reply to the answer, nor can it be determined from the paper what allegations were denied. Every pleading should be certain and complete within itself, so that its exact character can be determined without reference to any other pleading. The entry made by the clerk, in making up the record, cannot aid the vagueness and uncertainty in this paper. We cannot, by holding the paper in question a good reply, give our sanction to such a loose system of practice. The precise point was involved in the case of *Debord v. La Hue* 26 Ind. 212, and was decided adversely to the sufficiency of such a reply.

The appellant maintains that under section 372 of the code, 2 G. & H. 218, judgment was properly rendered for the defendant in the court below. That section reads as follows:

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"Where upon the statements, in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party."

"The appellant also refers to *Martindale v. Price*, 14 Ind. 115, where it was held, that "if the plaintiff fail to reply to a paragraph of the answer which would bar a recovery, the defendant has the right to judgment on the pleadings; but, if he fail to assert that right in the court below, by a proper motion, he cannot be allowed to avail himself in the Supreme Court of the facts admitted in the pleadings."

There is no doubt that the ruling in that case was correct, but it is not decisive of the case under consideration, as it leaves open and undetermined the questions when such a motion should be made, and the effect of failing to make the motion at the right time and in the proper manner.

This court, in *Preston v. Sandford's Adm'r*, 21 Ind. 156, states the law as follows:

"When the defendant had put in his affirmative answers, containing matter of avoidance, he was entitled to his rule for a reply; and on failure of the plaintiff to comply with it, he might have craved judgment against him, taking his answers, as admitted to be true. He was not bound to go to trial till issue was formed; but he consented to. He waived the reply, the preliminary step to a trial, and consented to treat the answers as untrue; though not denied, and to go to the proof of them as though denied. A trial was had accordingly, and resulted adversely to the defendant. All this appears of record. Hence, upon the record as it stands, the defendant is not entitled to judgment. Such is the settled practice under the code, on appeals to the Supreme Court." To the same effect are the following: *Martindale v. Price*, 14 Ind. 115; *Henly v. Kern*, 15 Ind. 391; *Knowlton v. Murdock*, 17 Ind. 487; *Davis v. Engler*, 18 Ind. 312; *Bender v. The State*, 26 Ind. 285; *Garner's Adm'r v. Board*, 27 Ind. 323.

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In *Sutherland v. Venard*, 32 Ind. 483, the law is stated thus:

"It is claimed by the appellants that the trial was had without any reply being filed to the second and third paragraphs of the answer, and they insist on a reversal for that reason. No such question was presented to the lower court, either before or after verdict, and it is too late to present it for the first time in this court. Indeed, it is a settled rule of practice in this State, that where the defendant takes no steps before trial, to compel a reply to an answer, and does not ask for a judgment for want of a reply, but voluntarily goes to trial, he thereby waives the reply, and is regarded as consenting to go to the proof of the answer as if denied. *Preston v. Sandford's Adm'r*, 21 Ind. 156; *Shirts v. Irons*, 28 Ind. 458; *Ringle v. Bicknell*, ante, p. 369."

We are of the opinion that the defendant, by going to trial without a reply, waived any objection thereto, and that, consequently, he was not entitled to a judgment on his answer, and that the court should have rendered a judgment for the plaintiff on the verdict.

The next question presented for our decision is, whether the court erred in overruling the demurrer to the complaint.

There is but one objection urged to the sufficiency of the complaint, and that is, that the plaintiff failed to except to the decision of the court in rendering judgment for the defendant, *non obstante veredicto*. This presents for our decision the question, whether a review can be had of a judgment in the court that rendered it, for error of law appearing upon the judgment, when no exception was taken to the ruling complained of. Sections 586 and 587 of the code (2 G. & H. 279, 280) read as follows:

"Sec. 586. Any person who is a party to any judgment, or the heirs, devisees, or personal representatives of a deceased party, may file in the court where such judgment is rendered, a complaint for a review of the proceedings and judgment, at any time within three years next after the rendition thereof. Any person under legal disabilities may

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file such complaint at any time within three years after the disability is removed. But no complaint shall be filed for a review of a judgment of divorce."

"Sec. 587. The complaint may be filed for any error of law appearing in the proceedings and judgment, or for material new matter, discovered since the rendition thereof, or for both causes, without leave of court."

It was held by this court, in *Preston v. Sandford's Adm'r*, 21, Ind. 156, that there could be no review of a judgment, by the court that rendered it, for error of law appearing in the proceedings and judgment, unless an exception had been taken to the decision in the original cause, where the defendant had appeared to the action, and was, therefore, presumed to be personally present in court, and charged with notice of all the proceedings in the cause. The court say:

"We think we may safely lay down the proposition, that no court of review will reverse a judgment, in a valid cause, for an error in the proceedings which was waived by the party against whom the error was committed. Such a party is estopped to assert the error. As to him, indeed, it is not error. His waiver takes away, as to him, the quality of error in the proceeding. It is the province of courts of error and review to relieve a party injured from the consequences of erroneous rulings of the *nisi prius* courts, made against the party's consent, and over his objection.

"But how must this waiver by the party to a ruling below appear? It need not be entered formally upon the record. It appears by the absence of any objection and exception. Where a party is in court, it is held, that 'every failure to assert a legal right, at the proper time (during the progress of the cause), is a waiver of that right.' *Zehner v. Beard*, 8 Ind. 96. 'In *The Commonwealth v. Sowell*, 9 Met. 572, the court say, in reference to an erroneous ruling on the trial below, that, as the defendant had an opportunity, but failed to avail himself of it on the trial, of making his objections, his acquiescence was a waiver, and estopped him to raise it

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afterward.'" In support of such proposition a reference is made to a large number of decisions.

Again it is said: "And if a party is not allowed to claim as errors, on appeal, any irregularity in the proceedings which he consented to, how can he be allowed such a claim in a suit for review, for those irregularities, which, as to him, are not errors? See *Indiana Mutual Insurance Company v. Routledge*, 7 Ind. 28; also, *Foot v. Lefavour*, 6 Ind. 473."

The following definition is given of an exception, by this court, in *Farnsworth v. Coquillard's Adm'r*, 22 Ind. 453, namely:

"An exception is an objection taken to a decision of the court upon matter of law (2 G. & H. 208), and the objection is taken by way of exception, and is shown to the appellate court by being entered in certain cases upon the record, and in others by bill of exceptions incorporated in the record."

"A bill of review," says Justice STORY, "is in the nature of a writ of error, and its object is to procure an examination and alteration or reversal of a decree made upon a former bill."

The principle stated by Judge STORY has been recognized by this court in several well considered cases. *Ins. Co. v. Routledge*, 7 Ind. 25; *Coen v. Funk*, 26 Ind. 289; *McDade v. McDade*, 29 Ind. 340.

It seems to be settled by authority and on principle, that a judgment cannot be reviewed for error of law appearing in the proceedings and judgment, unless there was an objection and exception to the ruling of the court, which is sought to be reviewed, where the question would be waived where there was no exception. But this rule would apply where there was no waiver.

The appellant moved in arrest of judgment, for the reason that the court allowed interest on the verdict of the jury to the rendition of the judgment for the appellee in the proceeding to review. The appellant insists that the statute does not authorize interest upon a verdict, and in support of

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this position reference is made to *Blickenstaff v. Perrin*, 27 Ind. 530.

The question sought to be raised does not arise upon the record. It was very properly held, by this court, in *Groves v. Ruby*, 24 Ind. 418, that the objection to the allowance of interest on the verdict could not be raised by a motion for a new trial, or in arrest of judgment.

It is a well settled rule of practice in this court, that the form or substance of a judgment will not be reviewed here unless the attention of the lower court was in some form called to the defect complained of. This may be done when the judgment of the court is announced, by pointing out the objection; and if the objection is overruled, the party may except; or it may be done after the judgment is entered in the order book, by a motion to correct, modify, or vacate the judgment, which, if overruled, may be excepted to. *Femison v. Walsh*, 30 Ind. 167; *Smith v. Dodds*, 35 Ind. 452.

We are of the opinion that the court erred in overruling the demurrer to the complaint and in refusing a new trial.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to grant a new trial, and to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

D. P. Baldwin, for appellant.

KEMP v. MITCHELL and Others.

PLEADING.—Redemption.—A bill to redeem is not good in equity unless it contain a formal offer to pay whatever sum may be found due upon taking the account.

APPEAL from the Morgan Circuit Court.

DOWNEY, J.—The only error assigned in this case is, that

36	249
125	384
36	249
141	442
36	249
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the circuit court improperly sustained the demurrer to the cross complaint filed by Kemp.

Perry Hamilton sued Johnson and Armstrong, alleging that Kemp was, on the 29th of December, 1853, the owner of real estate described in the complaint; that, on that day, Kemp executed a mortgage on said real estate to the State of Indiana for two hundred and fifty dollars; that, on the 22d day of October, 1860, the mortgage being unpaid, Kemp sold and conveyed the land to said Johnson and Armstrong by a general warranty deed; that, on the 20th day of March, 1861, Johnson and Armstrong, by warranty deed, conveyed said lands to Mitchell and Mitchell; that, on the 31st day of December, 1863, said Mitchell and Mitchell, by warranty deed, conveyed the same to said plaintiff Hamilton; that the said plaintiff had been compelled to, and did, pay off the said mortgage, which was a breach of the covenant in the deed from said Johnson and Armstrong to said Mitchell and Mitchell; wherefore, etc.

Copies of the mortgage and deeds referred to are made part of the complaint.

Johnson and Armstrong, after setting out the facts of the case, say that said Kemp and said Mitchells are parties in interest herein, and ask that they be summoned to answer as to their interest and be made parties.

Accordingly Kemp filed his cross complaint, in which he alleges that, on the 22d day of October, 1860, he was the owner, in fee simple, of the lands set out in the complaint, and was the owner thereof at the time of the execution of said mortgage in the complaint mentioned; that, on that day, he sold said lands to Johnson and Armstrong, for twenty-six hundred and forty dollars, and, with his wife, executed to them a deed therefor; that, on the 20th day of March, 1861, he purchased said land back from said Johnson and Armstrong, and agreed to pay them eleven hundred and eighty dollars in money, and surrender certain notes made by them to him for the balance of the purchase-money; that Johnson and Armstrong, in pursuance of said contract, placed him

in possession of said land; that he borrowed of Mitchell and Mitchell eleven hundred and eighty dollars with which to pay said Johnson and Armstrong, and, in consideration of the loan to him by said Mitchell and Mitchell of said sum, he executed to them two promissory notes, one for the payment of seven hundred and sixty-nine dollars and fifty cents, on December 25th, 1861, and the other for seven hundred and sixty-nine dollars and fifty cents, due on the 25th day of December, 1862, with interest on each from March 21st, 1861; that to secure the payment of these notes, and the interest and usury thereon, he caused Johnson and Armstrong to convey, on the 21st day of March, 1861, the said real estate, to said Mitchell and Mitchell; that at the October term, 1863, of the common pleas, as he has since been informed, and believes, said Mitchells procured judgment against him in said court, on said notes and certain pretended tax receipts, in the sum of seventeen hundred and eighty-five dollars and eighty-two cents; that he had no notice or information that any action was instituted against him by said Mitchells, or was pending against him in said court or elsewhere, until long after said judgment was rendered; that about the time of the term of said court, he did learn that one Phelps, the attorney of said Mitchells, had been at his house, and left some sort of paper, which, being unlearned, he could not read, but understood to be a subpoena to appear as a witness; that he never, at any time until the — day of —, 18—, learned the character of said paper, or that a judgment, as aforesaid, had been rendered against him, or the amount thereof, or that the same was declared to be a lien on said land, a copy of which judgment is filed with the cross complaint; that on the 31st day of December, 1866, without his knowledge or consent, said Mitchells entered satisfaction of said judgment, without ever selling said lands or any part thereof, upon said judgment, and a copy of the satisfaction is filed; that at the time said deed and notes were executed, said Mitchells executed to him a bond or other instrument in writing, which he understood to be

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an instrument declaring and showing that said deed was to be held only as a mortgage; that before and about the time said judgment was rendered, he offered to satisfy the demands of said Mitchells, and to procure a release of the lien thereon for said loan, and to pay them the amount thereof, which the Mitchells refused; that before they acquired said judgment, the said Mitchells declared themselves to be the owners of said lands, and knowing that defendant was poor and had no means or property but said land, threatened to eject him therefrom, and repeatedly offered to sell said land to others, but he, on all occasions, declared the land to be his, and kept and retained possession thereof until, on the — day of —, 18—, said Mitchells, who knew him to be ignorant, of weak intellect, and greatly oppressed by his debts and claims, by them held as aforesaid, proposed to deliver to Susannah Kemp, wife of defendant, two horses of the value of one hundred dollars each, and two hundred dollars in money, if she would procure defendant to leave said premises; that she did accept two horses of the value of about one hundred and fifty dollars, and one hundred and eighty-two dollars and fifty cents in money, on said proposition from said Mitchells, they retaining, as they declared, seventeen dollars and fifty cents in money, to pay on said mortgage set out in the complaint; that said Mitchells agreed, if she would permit them to retain said seventeen dollars and fifty cents from said two hundred dollars, they would satisfy the principal of said mortgage; that in accordance with said proposition, said Susannah, who was living with said defendant on said land, and who exercised great control over said defendant and his affairs, left said lands and took a portion of defendant's personal property therefrom, but defendant still retained possession of said land, and the dwelling-house thereon, until long after the 31st day of December, 1863, when said Mitchells conveyed the same to plaintiff, as shown by the deed, a copy of which is filed herewith; that plaintiff had full notice of defendant's interest in said lands at the time said deed was executed to him by said

Mitchells, and, to get possession of said lands, after said deed was executed, forcibly and fraudulently took the same from defendant; that before the execution of said deed by said Mitchells to plaintiff, said Mitchells, and others in their interest, and for their purposes, fraudulently procured said defendant to deliver the bond and instrument, by them executed to him as aforesaid, for examination, and afterward procured said defendant to execute some writing to said Mitchells, in connection with said bond, whether on the same or otherwise, defendant is unable to state, and that said Mitchells, or others in their behalf, kept said bond and said other writing, so that defendant is unable to furnish a copy thereof; that for the reason that plaintiff and said Mitchells have, by the frauds aforesaid, deprived him of his said lands, and he has no other means or property, he is unable to bring into court the amount of said loan, and the interest thereon as he would otherwise do; that said lands are of the reasonable value of four thousand dollars; that said Mitchells are learned, cunning, and astute bankers and usurers, while he is, as before alleged, ignorant and of weak intellect, and that said plaintiff and Mitchells have, in all their acts aforesaid, confederated and conspired to cheat; wherefore, defendant prays that the deed aforesaid from said Mitchells to said plaintiff may be set aside and held for naught; that the deed from Johnson and Armstrong to the Mitchells be declared to be a mortgage to secure the payment of said loan of eleven hundred and eighty dollars; that the Mitchells be required to proceed to foreclose said mortgage, or that the court declare that said lands shall be sold as upon a foreclosure of said mortgage; that out of the proceeds, the school mortgage, set up in the complaint, be satisfied, with the loan of the Mitchells, and that the residue of the proceeds of said land be paid to this defendant, and for all other proper relief.

Several objections are urged to the cross complaint. It is a little difficult to classify the pleading. It is not, we sup-

pose, intended as a complaint to foreclose a mortgage, for such a complaint is filed by the mortgagee or his assigns; but this is filed by the party who claims to stand in the position of mortgagor. We are not aware of any rule of law by which a mortgagor can, by complaint, compel the mortgagee to foreclose the mortgage, or foreclose it for him.

We are inclined to regard the cross complaint as one to redeem the mortgage, and regarding it as such, the question is, is it sufficient? What are the essentials of such a complaint? As it is equitable relief which is sought, we must, in the absence of any statutory provision on the subject, look to the approved authorities on the subject of equity pleading for an answer to these questions. If the deed was but a mortgage, as claimed by Kemp, then he was bound to pay the money at the time stipulated, or, according to the doctrines of the courts of law, his right to pay off the debt and have his land back was gone. But in equity the rule was different. There he might come afterward with the money and interest, and, on paying, have a return of the pledge. If the mortgagee refused to accept it, he might file his bill to redeem, and, praying the court to take the account, and offering to pay what might be found due, the court would take jurisdiction, ascertain the amount, and compel the mortgagee to accept it, and give up his claim upon the mortgaged property. But, though it was not necessary that the party filing such a bill should actually bring the money into court, in the first instance, it was necessary that he should offer to pay the amount which he acknowledged to be due, or which the court should find to be in arrear.

"It is a uniform requirement, in regard to bills to redeem, that the bill should contain a formal offer to pay whatever sums the plaintiff admits to be due; and the prayer, that upon payment of whatever sums might be found due upon taking the accounts between the parties, the mortgagee or other incumbrancer might be decreed to reconvey the property, is not sufficient. Such a bill was held bad upon de-

murrer, and leave granted to amend by inserting a formal offer to pay. It is not important that the offer to pay should name any sum which the plaintiff admits to be due, although in point of practice a definite sum is commonly tendered in such cases, in order to recover costs, if the sum found due falls below the sum tendered. But the bill must contain a formal offer to redeem, by paying whatever sum shall be found due upon taking the account." Story's Eq. Pl., sec. 187 (a); *Harding v. Pingey*, 10 Jur. (N. S.) 872.

"A bill in equity must state a case upon which, if admitted by the answer, a decree can be made; therefore a bill to redeem from a sale upon execution of a right of redemption, which contains no averment of readiness to pay and an offer to pay, is bad on demurrer, for want of equity." *Perry v. Carr*, 41 N. H. 371.

Counsel for the appellant, however, refer us to *Crassen v. Swoveland*, 22 Ind. 427, and *Crane v. Buchanan*, 29 Ind. 570, and contend that the plaintiff should recover on the authority of those cases. But those were actions brought for money had and received, the mortgagee having sold the land for more than the amount of the debt. The cross complaint cannot be sustained as a complaint for the recovery of money. The code enumerates four things which the complaint "shall contain." 2 G. & H. 69, sec. 49. The fourth of which is "a demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money be demanded, the amount thereof shall be stated."

This question was considered, by this court, in *Colson v. Smith*, 9 Ind. 8, and it is evident that if the amount of money for which judgment was asked had not been specified in the body of the complaint and referred to in the prayer, it would have been adjudged bad as a complaint for money. If the defendant do not demur, but answers the complaint, any relief may be granted to which the complaint shows the party to be entitled.

We are unable to see any such connection between the

matter set up in this cross complaint and the cause of action of the plaintiff as would authorize the filing of a cross complaint. The cause of action was simply a breach of the covenant against incumbrances in one of the deeds constituting a link in the plaintiff's chain of title. The controversy between Kemp and the Mitchells had no connection with it whatever.

In *Fletcher v. Holmes*, 25 Ind. 458, this court say: "The statute expressly confers power to determine the rights of the parties on each side of a case as between themselves, when the justice of the case requires it." 2 G. & H. 218, sec. 368. "The mode of procedure, however, is not pointed out by the statute, and as the authority given is one previously possessed only by courts of chancery, we suppose the rules of pleading and practice of those courts, modified by the spirit of the code, must be resorted to." 2 G. & H. 336, sec. 802. "In those courts, when a defendant sought relief against a co-defendant, as to matters not apparent upon the face of the original bill, he must file his cross bill, alleging therein the matters upon which he relied for relief, making defendants thereto of such co-defendants and others as was proper, and process was necessary to bring them in," etc.

Following out this idea, and referring to the authorities with reference to cross bills, we find, as we think, a satisfactory solution of the question in hand.

"A cross bill, *ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill," etc. Story's Eq. Pl., sec. 389.

"A cross bill is a bill brought by a defendant against a plaintiff, or other parties in a former bill depending, touching the matter in question in that bill." Mitford Ch. Pl. 80. So in *Cross v. De Valle*, 1 Wal. 1, it is said: "A cross bill, being an auxiliary bill simply, must be a bill touching matters in question in the original bill." *Frear v. Bryan*, 12 Ind. 343. But as the demurrer in this case was by the

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Mitchells, and not by Hamilton, perhaps this last question does not properly arise.

The judgment is affirmed, with costs.

W. R. Harrison and W. S. Shirley, for appellant.

J. S. Hester, J. V. Mitchell, and J. N. Sweetser, for appellees.

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145	44
147	211

REAL ESTATE.—*Recovery of.—Uncertain Description.—Evidence.*—In a suit to recover a part of ten acres of land off of the east side of the south-east quarter of section thirty-four in township thirty-six, north of range eleven east, in Ripley county, Indiana;

Held, that the plaintiff should not be permitted to introduce in evidence to show his paper title a deed conveying "ten acres off of the south east side" of the quarter section described.

SAME.—*Oral Evidence.*—Where the plaintiff in a suit to recover real estate has been permitted to give oral evidence of his possession and adverse title to the land, the same privilege should be accorded to the defendant.

APPEAL from the Ripley Circuit Court.

PERRIT, J.—This was a suit by the appellee against the appellant for the recovery of real estate, and the complaint was this:

Plaintiff says he is the owner in fee simple of ten acres of land off of the east side of the southeast quarter of section thirty-four, in township six, north of range eleven east, in Ripley county, Indiana; that said defendant now holds possession of a part of said ten acres of land off of the west side and north end of said tract, it being about two and one-half rods wide at the north end and running to a point at the south end of said ten acres, without right, and for two years last past has unlawfully kept the said plaintiff out of possession; wherefore he demands judgment against said

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defendant for the recovery of said land, and one hundred dollars damages for being kept out of possession, and for the use of said land, and for all general relief.

There was an answer of general denial; trial by jury; verdict for the plaintiff; motion for a new trial overruled and exception, and judgment for the plaintiff on the verdict. There is no brief on file for the appellee. There are many errors assigned, but they are all waived except these:

1. The admission of certain deeds to prove the title.
2. The refusal to allow the appellant to introduce evidence to show the boundary of the land, and adverse possession for more than twenty years.
3. The giving of the second and eighth instructions of the court, all of which were objected and excepted to at the proper time.

The deeds which were introduced by the plaintiff, and which were necessary to make out a paper title to the land sued for in him, described the land as "ten acres off of the southeast side" of the quarter section, etc.

We take judicial notice that the lands in Ripley county were surveyed and laid out by act of Congress, and that their sides are east, west, north, and south, and that there can be no such description of, or in relation to, a congressional survey of them as the "southeast side" of a quarter section; and we hold that these deeds were not admissible in evidence for uncertainty, in the description not corresponding with the description given in the complaint, nor covering the same or any other grounds. No attempt had been made in this, or any other suit, to reform these deeds. These deeds do not describe ten acres off of the "east side" of a quarter section, as in the complaint, but ten acres off of the "southeast side," etc.

As to the second question. The plaintiff below, appellee here, not being satisfied with his paper title, had been allowed to give oral evidence, and did give such evidence of his possessory and adverse title to the land. The defendant offered to give the same kind of evidence of his title,

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but was not allowed to do so. Upon what principle or rule we cannot see, but we hold that the refusal was error.

It is not necessary to notice the instruction either given or refused, as our rulings above will require a new state of evidence to enable the plaintiff to recover. On a new trial, the evidence will be different, and consequently different instructions must be given.

Instructions should always have a close relation to the law of the case, and the evidence as given.

The judgment is reversed, at the costs of the appellee, with instructions for further proceedings not inconsistent with this opinion.

H. W. Harrington, J. W. Gordon, and J. R. Troxell, for appellee.

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144	580

DAMAGES.—*Measure of.*—*Contract.*—The measure of damages for the failure to manufacture and deliver an article according to contract is the difference between the price to be paid for the article on delivery and its market value; and this rule applies although the market value may be enhanced by the fact that the article is patented and the right to sell held exclusively by the party who contracted to have the article manufactured.

APPEAL from the Marion Circuit Court.

WORDEN, C. J.—Suit by the appellee against the appellants upon a written contract between the parties, by which the defendants agreed to build and deliver to the plaintiff two hundred or more sewing machines of the model which the plaintiff furnished the defendants, for which the plaintiff was to pay the defendants the sum of six dollars per machine, the machines to be delivered as the plaintiff might order, not to exceed nine per week, but all to be delivered within a year from the date of the contract, and the defendants to have two weeks notice upon each order. Breach, that the

defendants failed to make and deliver the machines in accordance with the contract.

Issue, trial, verdict, and judgment for the plaintiff for the sum of six hundred and twenty-five dollars, a motion for a new trial being overruled and exception taken.

There are two points only made by counsel for the appellants, for the reversal of the judgment: first, that the court adopted an erroneous rule for the measure of damages, and, second, that the damages assessed are excessive.

It appeared on the trial that the defendants failed to manufacture or deliver any of the machines, and the court permitted evidence to go to the jury, over the objection of the defendants, of the market value of the machines at the time they were to have been delivered, and instructed the jury that the measure of damages was the difference between the price to be paid for the machines and their market value at the time they were to have been delivered. The machine seems to have been a patented article, known as the "Little Giant," and the plaintiff had a license to vend the same.

It is not controverted that the rule for the measurement of damages adopted by the court would have been correct, had the article to be manufactured and delivered not been a patented article. As applied to contracts for the manufacture and delivery of articles not patented, the rule applied seems to have been correct. *McAroy v. Wright*, 25 Ind. 22. But it is contended by counsel for the appellants, that inasmuch as the royalty, or exclusive right to vend the patented article enters into and enhances the market value of the article, a different rule of damages should prevail. It is believed that there is no authority for the distinction sought to be drawn, nor are we aware of any to the contrary.

As a general rule, it may be laid down, "that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken." *Alder v. Keighley*, 15 Mees. & W. 116; Sedgw. Dam., 5th ed., p. 219. The rule applied in the case under consideration is in entire harmony with that stated by the court of ex-

chequer, as above cited. The market value of the articles was equivalent to the articles themselves, and from that was properly deducted the amount to be paid for them by the plaintiff because payment had not been made. This was giving to the plaintiff just the equivalent of what he would have received if the contract had not been broken.

After some consideration, we have come to the conclusion that the distinction sought to be drawn, as above stated, is not well founded. The market value of a patented article may be, and, in most instances probably is, considerably greater than if it were not patented, because the patentee has a monopoly of the market, and can fix such a price as will yield him the greatest revenue. The patentee may fix the price of the article so little above the cost of production as that he will derive but a nominal benefit from his patent; or he may fix the price so high as to be prohibitory of sales, and thereby derive as little benefit from his patent as in the other instance; or again, he may fix the price of the article at a point the highest it will bear, consistent with ready sales and a general use of the article, and this price will probably yield him the greatest revenue, and, perhaps, may be regarded as a close approximation to the market value of the article. The price or market value of a patented article will, like articles not patented, be regulated by the law of demand and supply, and, for aught we can perceive, may be as fixed and determinate as the price or value of an article not patented.

The plaintiff was damnified by the defendants' failure to make and deliver the machines, just to the extent of the market value of the machines, (less, of course, the amount he was to pay therefor) because he must be supposed to have been able to turn them into ready money at their market value, and it cannot be material that the market value was enhanced by the fact that the machines were patented. He had a right to the benefit of the patent in whatever degree it entered into the market value of the article.

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We are of opinion that no error was committed in respect to the rule of damages.

Upon an examination of the evidence, we cannot say that the damages assessed were excessive.

The judgment below is affirmed, with costs.

*A. G. Porter, B. Harrison, and W. P. Fishback, for appellants.
M. M. Ray, J. W. Gordon, and W. March, for appellee.*



VANSICKLE and Others v. ERDELMAYER, Treasurer of Marion County.

TURNPIKE COMPANY.—*Articles of Association.*—The articles of association of a gravel road company were held to be not invalid because the amounts subscribed might be paid in instalments of one, two, and three years, commencing with the year 1868, either in money or labor and at such times in each year as the directors might determine.

DEMURRER.—*Parties.*—A demurrer for want of proper parties must point out or name the person who is not, but should be, made a party.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—This was an action by the appellants to enjoin the collection of certain assessments made for the construction of the "Pleasant Run Gravel Road," in Marion county, under the act of March 11th, 1867. There was a demurrer to the complaint, which was sustained, and this is the only alleged error.

The sole ground on which the injunction was asked was that the articles of association of the company were illegal, and the company was not therefore duly organized, because the amounts subscribed may be paid in payments at one, two, and three years, commencing with the year 1868, in money or labor, and at such time in said years as the directors may determine.

It is urged in the brief, that it is unjust to those who are assessed, and who must pay in money, that the original sub-

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138	309
36	262
180	117

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scribers may pay in work. We are not able to see the hardship of this. The work must be done, of course, at cash prices, which would make it as valuable to the company as cash, and not give any undue advantage to the parties thus paying. If the work shall not be done when required, the amounts become payable exclusively in money. The stipulation is in the articles of association. There is no concealment or fraud. It is not like the case where there is a private stipulation with a subscriber that he may pay in some manner, or at some other time than the other subscribers, and which would be a fraud upon them. But even in that kind of case, it is held that the private condition or stipulation is invalid, but the subscription binding. *Henry v. The Vermillion, etc., Railroad Co.* 17 Ohio, 187. Nor do we think there is anything in the fact that the sums are payable in annual instalments. The amounts to be raised by assessments are payable in three or more yearly payments, and there would seem to be, at least, no impropriety in making the subscriptions payable in the same way.

It is urged by the appellee that the demurrer to the complaint was rightly sustained for a defect of parties defendants, because the company was not made a party to the suit. We think this objection is not properly presented. It is true that the company is more deeply interested in the collection of the assessments than any other party, and it is specially interested in the question as to the validity of the organization of the company. But the demurrer, though it alleges a defect of parties, does not, as required by the practice sanctioned by this court, point out or name the person, or persons who should be, but who are not made parties. *Gaines v. Walker*, 16 Ind. 361.

The judgment is affirmed, with costs.*

J. M. Johnston, J. M. Cropsey, and G. W. Kirkland, for appellants.

L. Barbour, C. P. Jacobs, and C. W. Smith, for appellee.

*Petition for a rehearing overruled.

WRIGHT and Another v. HAWKENS.

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148	237

PRACTICE.—*Trial by Court.—Motion for New Trial.—Judgment.*—Where a jury has been waived and there has been a general finding, and an oral motion for a new trial has been made by the party against whom the finding has been made, the court cannot set aside the finding and enter a general finding for the other party and render judgment thereon.

APPEAL from the Montgomery Common Pleas.

BUSKIRK, J.—This was an action by the appellants against the appellee, upon the covenants of a deed against incumbrances. There was a demurrer to the complaint, which was overruled, and an exception taken. The defendant answered in two paragraphs. There was a demurrer to the first paragraph of the answer, which was overruled, and an exception taken. The plaintiffs replied by a general denial.

The cause was, by the agreement of the parties, submitted to the court for trial. The following facts are presented by a bill of exceptions in the record, namely:

"Be it remembered, that on the tenth judicial day of the February term, 1870, of the Montgomery Court of Common Pleas, the above entitled cause was submitted to the court for trial, and the court, after hearing the evidence and argument of counsel, found for the plaintiffs, and assessed their damages at one hundred and forty-four dollars. Whereupon the defendant moved the court orally for a new trial, and day was given; and afterward, to wit, on the fifteenth judicial day of said term of said court, the judge thereof, on his own motion, and without any written motion or cause therefor being filed, and over the objection of the plaintiffs, set aside said finding, overruled plaintiffs' motion for judgment on the finding, entered a new finding for the defendant, and rendered judgment thereon over the plaintiffs' objections in favor of said defendant; to all of which the plaintiffs excepted, by their counsel, and pray that this, their bill of exceptions, may be sealed and signed by the court, which is done this February 16th, 1870."

The principal error assigned and relied upon by the appellants presents for our decision the question of whether the above action of the court was correct and can be sustained. The action of the court was, beyond all doubt, erroneous, and the judgment must be reversed.

By section 320, 2 G. & H. 196, issues of fact must be tried by a jury, unless a jury trial is waived.

Section 340, 2 G. & H. 207, points out the manner in which a jury trial may be waived.

Section 341, 2 G. & H. 207, provides that "upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it," etc.

Section 357, 2 G. & H. 216, provides that "the provisions of this code respecting trials by jury apply, so far as they are applicable, to trials by the court."

"The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving judgment thereon to the court." 2 G. & H. 205, sec. 335.

Section 350, 2 G. & H. 218, provides that "when a trial by jury has been had, and a general verdict rendered, the judgment must be in conformity to the verdict."

Section 351, 2 G. & H. 218, provides: "Where the verdict is special, or where there has been a special finding on particular questions of fact, the court shall render the proper judgment."

The duty of the court is plain and imperative when there is a general verdict. The judgment must conform to the verdict. When there is a special verdict, the court applies the law to the facts found, and renders the proper judgment. The judgment of the court must follow and conform to a general verdict, unless the court, upon proper application, and for good cause shown, may grant a new trial, award a *venire de novo*, or arrest the judgment. It is expressly pro-

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vided that the provisions of the code respecting jury trials shall apply to and govern trials by the court, so far as they are applicable.

The general finding of the court takes the place, and has the force and effect, of the general verdict of the jury, and the judgment of the court must follow and conform to the general finding, unless the court shall, upon motion and good cause shown, grant a new trial or arrest the judgment. It is quite clear to us that when the court has rendered a general finding for one of the parties, it cannot, of its own motion and arbitrarily, set aside such general finding, and render a general finding and judgment for the other party. Such a course might deprive a party of substantial rights. If a new trial was granted, the plaintiff might demand a trial by jury, might take a change of venue from the judge or county, or might dismiss his action. None of these things can be done where the court changes its finding and renders judgment thereon. There was no motion made for a new trial in this case by the defendant. As a general rule, it is always safer for a court to leave the management of a cause to the counsel, and to rule on such motions as may be submitted by them; but there may be cases where the court is satisfied that there is collusion between parties, or that a fraud has been practised upon the court, or where the court should discover in a divorce case that the plaintiff was not a resident of the State, in which case the court would be justified, on its own motion, in setting aside a verdict, finding, or judgment; but in such case the court should order a new trial, and leave the parties to their rights under the law. This may have been such a case.

The judgment in favor of the appellee is reversed, with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

P. S. Kennedy and R. H. Galloway, for appellants.

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THE INDIANAPOLIS, CINCINNATI, AND LAFAYETTE RAILROAD
COMPANY v. JOHNSON.

APPEAL from the Morgan Circuit Court.

PETTIT, J.—This case, in all legal aspects, is the same as *The Indianapolis, Cincinnati, and Lafayette Railroad Co. v. Warner*, 35 Ind. 515, appealed from the same court, and is reversed, on the authority of that case.

The judgment is reversed, at the costs of the appellee.

S. P. Oyler, and D. W. Howe, for appellant.

SEARS and Others v. THE BOARD OF COMMISSIONERS OF
WARREN COUNTY.

LICENSE TO VEND FOREIGN MERCHANDISE.—*Constitution of the United States.*

Non-Residents of this State.—The provision contained in "an act concerning licenses to vend foreign merchandise, to exhibit any caravan, menagerie, circus, rope and wire dancing, puppet show, and legerdemain," 1 G. & H. 424, which requires a license fee to be paid by travelling merchants and pedlers, who are not residents of this State, to vend foreign merchandise, is not in conflict with the clause of the constitution of the United States which declares that "Congress shall have power to regulate commerce with foreign nations, and among the several states," article 1, section 8, clause 3. It is not in conflict with the prohibition contained in clause 3, article 1, section 10, of that constitution declaring that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" nor is it in conflict with the provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," section 2, article 4.

SAME.—*Constitution of this State.*—*Citizens.*—*Non-Residents.*—The provision, in the constitution of this State, that "the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens," section 23, article 1, has no application to non-residents or persons who are not citizens of this State and who are doing business in the State.

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APPEAL from the Warren Circuit Court.

BUSKIRK, J.—This case was heard and decided in the court below upon an agreed statement of facts; and that statement fully raises the question whether so much of an act entitled “an act concerning licenses to vend foreign merchandise, to exhibit any caravan, menagerie, circus, rope and wire dancing, puppet show, and legerdemain” (Approved June 15th, 1852,) as affects a license to vend foreign merchandise is in conflict with the constitution of the United States, and of this State.

The substance of the agreed statement of facts is as follows:

“That Alvin High is the legally elected and qualified treasurer of Warren county, Indiana; that the defendants are residents of Iroquois county, in the State of Illinois, and are doing business under the firm name of F. J. Sears & Co.; that said defendants are travelling merchants or pedlars, vending foreign merchandise, except tea and coffee, in Warren county, Indiana, and have entered upon the fourth year in the same business, with the same capital employed in Warren county, and without obtaining a license from the county treasurer, or paying the amount required for said license, as hereinafter stated; that the capital employed by the said defendants in Warren county, as such travelling merchants and pedlars, amounts yearly to the sum of two thousand and five dollars, and that said defendants have not paid to the treasurer of Warren county, for any of said years, the amount required for a license.” The cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the plaintiffs. The court overruled a motion for a new trial and rendered judgment on the finding. The appellants excepted and appealed to this court.

So much of the statute under consideration as requires of venders of foreign merchandise a license reads as follows:

“To travelling merchants and pedlars, who are not residents of this State, to vend foreign merchandise, five dollars, where the capital employed does not exceed one thou-

sand dollars ; seven dollars and fifty cents for any amount over one thousand dollars, and not exceeding two thousand dollars ; ten dollars for any amount over two thousand and not exceeding five thousand dollars, and twenty dollars for any amount exceeding five thousand dollars ; to be paid in each county where they shall offer for sale any such merchandise, except tea and coffee." 1 G. & H. 424.

It is maintained by the appellants that the above quoted statute is in conflict with the following clauses of the Constitution of the United States, and of this State.

"Congress shall have power to regulate commerce with foreign nations, and among the several States." Art. 1, sec. 8, clause 3.

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States ; and all such laws shall be subject to the revision and control of the Congress." Clause 3, article 1, section 10.

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Sec. 2 of article 4.

"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Sec. 23 of article 1, Constitution of Indiana.

This is the first time that the precise question involved in this case has come before this court for examination and decision, and, in the absence of adjudged cases in this court, we shall mainly rely upon the decisions of the Supreme Court of the United States. Even if the decisions of the Supreme Court of the United States, which place a construction upon and give an interpretation to the federal constitution, be not absolutely binding and conclusive upon the state courts, they are entitled to the highest weight and

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consideration ; and where the question involved has not been settled and determined by decisions of the state court, the construction given to such instrument by the federal courts should be recognized and treated as the true construction.

The delicacy and importance of the question involved in this case are stated with great clearness and force by Mr. Justice MILLER, in delivering the opinion of the Supreme Court, in *Woodruff v. Parham*, 8 Wal. 123, where he says :

"The subject of the relative rights and powers of the Federal and state governments, in regard to taxation, always delicate, has acquired an importance by reason of the increased public burdens growing out of the recent war, which demands of all who may be called in the discharge of public duty to decide upon any of its various phases, that it shall be done with great care and deliberation. Happily for us, much the larger share of these responsibilities rests with the legislative departments of the state and Federal governments. But when, under the pressure of a taxation necessarily heavy, and in many cases new in its character, the parties affected by it resort to the courts to determine whether their individual rights have been infringed by legislation, and assert rights supposed to be guaranteed by the Federal Constitution, they, in every such case properly brought before us, devolve upon this court an obligation to decide the question raised from which there is no escape."

In reference to the first clause of the Constitution of the United States, above quoted, and which confers upon Congress the power "to regulate commerce with foreign nations, and among the several states," all decisions of the Supreme Court agree that the power "to regulate commerce with foreign nations" confers upon the federal government the sole and exclusive power to regulate and control all commercial intercourse between the United States and all foreign nations ; and that the power to regulate commerce "among the several states" is restricted and limited in its force and application to the several states, as states, and confers upon

Congress no power of regulation, or direct control over the internal commerce or domestic trade of the states.

It was held by the Supreme Court, in *Brown v. The State of Maryland*, 12 Wheat. 419, that the clause under consideration conferred on Congress the sole and absolute power to regulate and control all commercial intercourse between the United States and foreign nations, and among the several states; that the right to import foreign merchandise carried with it the right to sell the goods imported in the form and shape in which they were imported; that it prohibited the states from imposing any tax upon an imported article while in the hands of the importer, or while in transit through the state from one port to another, for the purpose of re-exportation.

It was said by Mr. Chief Justice TANEY, in the License Cases, 5 How. 504, that "it is equally clear, that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several states; and that beyond these limits, the states have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every state, therefore, may regulate its own internal traffic, according to its own judgment, and upon its own views of the interest and well-being of its citizens."

Mr. Chief Justice CHASE, in delivering the opinion of the Supreme Court, in the License Tax Cases, 5 Wal. 462, says:

"Thus, Congress having power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee.

"But very different considerations apply to the internal

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commerce or domestic trade of the states. Over this commerce and trade Congress has no power of regulation, nor any direct control. This power belongs exclusively to the states. No interference, by Congress, with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject."

From these decisions, it is quite obvious to us that the statute under consideration is not repugnant to the power given to Congress to regulate commerce with foreign nations and among the several states.

Is the statute under consideration in conflict with that clause of the federal constitution which prohibits the states from laying any imposts or duties on imports or exports?

This question came directly before the Supreme Court of the United States, for the first time, in the case of *Brown v. The State of Maryland*, 12 Wheaton, 419. The opinion of the court was delivered by Chief Justice MARSHALL. Mr. Chief Justice TANEY has, in the License Cases *supra*, condensed and placed a construction upon the very able and learned opinion of Chief Justice MARSHALL, and we copy from the opinion of Chief Justice TANEY. He says:

"And the court there held that an article authorized by a law of Congress to be imported continued to be a part of foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no state, either by direct assessment, or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported, beyond what the law of Congress had itself imposed; but that, when the original package was broken up, for use or for retail by the importer, and also when the com-

modity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the state, and might be taxed for state purposes, and the sale regulated by the state, like any other property."

But it may be claimed that the court, in *Brown v. Maryland*, *supra*, decided that a state could not levy a tax upon property that had been imported from a sister state. The remark of Chief Justice MARSHALL that is relied upon to sustain that view has been recently examined, explained, and qualified by the Supreme Court, in *Woodruff v. Parham*, 8 Wal. 123. In the latter case it is said:

"The case of *Brown v. Maryland*, as we have already said, arose out of a statute of that state, taxing, by way of discrimination, importers who sold, by wholesale, foreign goods. And Chief Justice MARSHALL, in delivering the opinion of the court, distinctly bases the invalidity of the statute, first, on the clause of the constitution which forbids a state to levy imposts or duties on imports; and, second, that which confers on Congress the power to regulate commerce with foreign nations, among the states, and with the Indian tribes.

"The casual remark, therefore, made in the close of the opinion, 'that we suppose the principles laid down in this case to apply equally to importations from a sister state,' can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore, a judicial decision of the question, even if the remark was intended to apply to the first of the grounds on which that decision was placed.

"But the opinion in that case discusses, as we have said, under two distinct heads, the two clauses of the constitution which he supposed to be violated by the Maryland statute, and the remark above quoted follows immediately the discussion of the second proposition, or the applicability of the commerce clause to that case.

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"If the court then meant to say that a tax levied on goods from a sister state, which was not levied on goods of a similar character produced within the state, would be in conflict with the clause of the constitution, giving Congress the right 'to regulate commerce among the states,' as much as the tax on foreign goods, then under consideration, was in conflict with the authority 'to regulate commerce with foreign nations,' then, we agree to the proposition."

The court, in the same case, say: "It is not too much to say that, so far as our research has extended, neither the word export, import, or impost is to be found in the discussions on the subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. The only allusion to imposts in the articles of confederation is clearly limited to duties on goods imported from foreign states. Wherever we find the grievance to be remedied by this provision of the constitution alluded to, the duty levied by the states on foreign importations is alone mentioned, and the advantages to accrue to Congress from the power confided to it, and withheld from the states, are always mentioned with exclusive reference to foreign trade."

"Whether we look, then, to the terms of the clause of the constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one state to tax articles brought into it from another. If we examine, for a moment, the result of an opposite doctrine, we shall be well satisfied with the wisdom of the constitution as thus construed."

"The merchant of Chicago who buys his goods in New York, and sells at wholesale in the original packages, may have his millions employed in the trade for half a lifetime and escape all state, county, and city taxes; for all that he is

worth is invested in goods which he claims to be protected as imports from New York. Neither the state nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares, or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

It is said by the Supreme Court, in *Ward v. The State of Maryland*, 9 Amer. Law Reg. (N. S.), 424, that "it would be a strained construction of the power to regulate commerce 'among the several states,' to hold that it confers upon Congress the power to authorize the citizens of one state to travel through another, and sell their goods, either carried with them, or by sample, without license, whilst the citizens of the state where they thus travel and trade can be rightfully subjected to a state tax on their goods, and a state license to sell them. But whether the clause in question confers such powers or not, it is sufficient that it has never been exercised by Congress, and therefore state laws and state regulations on the subject are valid; for the mere grant of such power to Congress, so far as it relates to a case like the present, is not, of itself, a prohibition to the states, so as to render all state laws on the subject null and void."

Mr. Justice McLEAN, in the License Cases, 5 How. 504, says: "A state cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the state, either specifically or in the form of a license to sell. A license may be required to sell foreign articles, when those of a domestic manufacture are sold without one."

Discriminations to this extent are made in the license laws of almost every state. In the case of *The People v. Thurber*, 13 Ill. 554, where a law imposing a tax of three per cent. on

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premiums charged by agents of foreign insurance companies was assailed, the court held it not to be a tax on property, but a burden imposed on the agent for the right of exercising a franchise or privilege within the state, which the legislature would have the right to withhold or inhibit altogether. "It would be strange," says the court, "if the legislature had not the power to prescribe the terms upon which foreign corporations should be permitted to come into this state and carry on their business, or even prohibit them altogether."

And in *Cumming v. Savannah*, R. M. Charl. 26, it was decided by Judge BERRIEN, that a law imposing a tax of fifty cents on the one hundred dollars on all goods, wares, and merchandise not the produce of the state, which shall be sold on commission in the city of Savannah by any person residing within its limits, was a legitimate exercise of power by the state as a regulation of its own internal trade and commerce.

We will next examine whether there is anything in the section relating to "privileges and immunities" which is contravened by the act under consideration. The Supreme Court has declined to give a general construction to this section.

In *Conner v. Elliott*, 18 How. 591, the court say: "We do not deem it needful to attempt to define the meaning of the word privileges in this clause of the constitution. It is safer, and more in accordance with the duty of a judicial tribunal to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true, when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief."

The Supreme Court of Maryland, in *Campbell v. Morris*, 3 H. & McH. 535, gave a partial construction in these words: "It means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as

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personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected. It means such property shall not be liable to any taxes or burdens which the property of the citizens is not subject to. It may also mean that, as creditors, they shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights."

In the enumeration made by Judge WASHINGTON, in *Coryfield v. Coryell*, 4 Wash. C. C. 371, are included, "the right of a citizen of one state to pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the state courts; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state."

And in *Crandall v. The State*, 10 Conn. 336, Chief Justice DAGGETT held that "should a citizen of Connecticut purchase a farm in Massachusetts, and the legislature of Massachusetts tax the owner of that farm, four times as much as they would tax a citizen of Massachusetts, because the one resided in Connecticut and the other in Massachusetts; or should a law be passed by either of those states that no citizen of the other should reside or trade in its limits, such laws would be unconstitutional as violative of this clause in the Constitution of the United States."

The state of Maryland recently enacted a law that "no person, not being a permanent resident of this state, shall sell, offer for sale, or expose for sale, within the limits of the city of Baltimore, any goods, wares, or merchandise, other than agricultural products and articles manufactured in the state of Maryland, within the limits of said city, either by card, sample, or other specimen, or by written or printed trade list or catalogue, whether such person be the maker or

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manufacturer thereof or not, without first obtaining a license so to do."

The rate of license was fixed at three hundred dollars, to run one year from date, and the penalty of so selling without license is, for each offense, not less than four hundred nor more than six hundred dollars.

Ward was indicted for violating the above statute. His defense was that the statute was in conflict with the constitution of the United States.

The Supreme Court of that state, in *Ward v. Maryland*, *supra*, after construing the above quoted clauses of the federal constitution and reviewing several decisions, say: "These decisions certainly show that the provision (the one relating to privileges and immunities) is effective to prevent the property, real or personal, owned by a non-resident and located in the state, from being subjected to any higher rate of state taxation than similar property of resident owners; but, in our judgment, they do not cover the present case. The law before us is not a tax upon either person or property, but on a particular trade or business carried on in the state, and cannot, in our opinion, be regarded as imposing a higher rate of taxation upon non-residents than upon citizens, either in respect to person or property. Nor do we perceive it to be, in any other respect, unjust, unfair, or discriminating in operation and effect. We have shown that the state has power to impose a license tax on all trade or business carried on in its borders, whether by its own citizens or those of other states. The resident owner or trader is required to take out a license to carry on his business or trade, and his property and goods here situated are also subject to state, county, and city taxation. There is nothing upon the face of the law, or in this record, to show that the non-resident trader, doing the business thus taxed, is thereby subjected to heavier taxation than the resident merchant, carrying on the like retail or wholesale business. It certainly cannot be said to be an immunity or privilege secured by this clause of the constitution, that a non-resident merchant or trader shall

be permitted to come into a state and trade or do business therein, and pay neither a license tax on his trade nor a tax on his property, whilst the resident merchant must pay both; to have all the advantages of a resident trader, and escape all taxation to which the latter is subjected."

We are of the opinion that the statute in question is not repugnant to any of the above quoted clauses of the federal constitution.

We hold that the clause which confers on Congress the power to regulate "commerce among the states," does not comprehend any commerce which is purely internal, between man and man in a single state, or between different parts of the same state, and not extending to or affecting other states; and that commerce among the states means commerce which concerns more states than one. The completely internal commerce of a state is properly reserved to the state. The trade or business in which the appellants were engaged was purely internal traffic and does not come within the meaning of the phrase of "commerce among the states."

We are further of the opinion that the statute under consideration does not conflict with that clause of the federal constitution which prohibits the states from laying any imposts or duties on imports or exports, for the reason, that it is well settled that this clause only refers to imported goods while they remain in the original package in the hands of the importer; and that when the importer has sold such goods and they have become a part of the general mass of the property in the state, they have ceased to be articles of foreign commerce, and are subject to the sole and exclusive control and regulation of the state in which they may be.

It is quite obvious to us that the privilege and exemption claimed by the appellants do not come within any of the constructions that have been placed upon the section in relation to privileges and immunities.

The operation of the federal constitution is co-extensive with the boundaries of the United States; but the constitution of a state has no extra-territorial operation, and can

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only operate upon the citizens of the state. The above quoted section from our State constitution can have no application to non-residents of the State. The word citizen as used in said section has exclusive reference to citizens of this State, and not to citizens of other states who are doing business in this State.

The judgment is affirmed, with costs.

B. F. Gregory and *J. Harper*, for appellants.

J. H. Brown, for appellee.

 HAMILTON v. THE STATE.

CRIMINAL LAW.—Assault and Battery with Intent to Rob.—Declarations of Defendant.—Evidence of Intent.—Where evidence of an act done by a party is admissible, his declarations made at the same time, having a tendency to elucidate, explain, or give character to the act, are also admissible; accordingly, in a trial for assault and battery with intent to commit a robbery, witnesses for the State, in answer to questions put by the State having testified that while the assault and battery was being committed, the prisoner told the said witnesses, that three years before, the person upon whom he was then perpetrating the offense had assaulted him and drawn a pistol on him, and he, the prisoner, was now having his revenge for it, it was error for the court to instruct the jury, that the declaration of the defendant was not to be considered by them as evidence of the intent with which the assault was committed.

SAME.—Merger.—Trial for One Offense a Bar.—The offense of assault and battery with intent to rob is not merged in the crime of robbery. Both offenses are of the same grade, and if the doctrine of merger applies in this State, to criminal offenses, it certainly does not apply where both crimes are a felony. The State may elect which offense shall be prosecuted, where the evidence is sufficient to sustain a charge for either, and a trial for one will operate as a bar to a prosecution for the other.

SAME.—Evidence.—Evidence that the party assaulted had no money in his possession, where the charge is assault and battery with intent to rob of a five dollar bank note, is no defense.

APPEAL from the Montgomery Common Pleas.

DOWNY, J.—The accusation against the appellant, by

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information in the Common Pleas, was that he did, on the 14th day of April, 1871, at the county of Montgomery, and State of Indiana, in a rude, insolent, and angry manner, unlawfully touch, strike, beat, and wound George H. Justice, with the intent, then and there, feloniously, forcibly, by violence, and putting him, the said George H. Justice, in fear, to take from the person of said George H. Justice a certain five dollar bill, current money of the United States, of the value of five dollars, the personal property of said George H. Justice, etc.

There was a plea of not guilty, trial by a jury, verdict of guilty, motion for a new trial overruled, and sentence.

As the only error assigned calls in question the ruling of the common pleas, in refusing to grant a new trial, and as that motion sets forth the points relied upon, we will recite it here. "Comes now the defendant, and moves the court for a new trial in the above entitled cause, for the causes following, to wit: Because of misdirection by the court to the jury, which misdirection consisted in the matters following: first, it having been testified by two witnesses for the State," naming them, "in answer to questions put by the attorney for the State, and during the examination-in-chief, that while the assault and battery alleged in the information to have been committed by the prisoner upon the person of Justice, the prosecuting witness, was yet going on, the prisoner told the said witnesses that Justice, some three years before, had assaulted him, and drawn a pistol on him, and that he was now having his revenge for it, the court, commenting on that point, instructed the jury, among other things, that the said declarations of the prisoner were not evidence, and could not be considered as evidence to show the intent of the assault and battery, or for any purpose, but must be disregarded; second, as a further misdirection, the court, in the charge, instructed the jury that counsel for the prisoner having argued that the prosecuting witness did not, at the time of the alleged assault and battery, have a five dollar bill in his possession, it was not a matter of any im-

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portance whether he did or did not have a dollar at the time, as the offense could have been committed, although the prosecuting witness had no money at all; third, as a further misdirection of the jury, the court in the charge instructed the jury, that the prisoner being on trial charged with an assault and battery, with intent to commit a robbery, could be found guilty of the charge, notwithstanding the proof showed to their satisfaction that there was no actual robbery committed, the intent being the gist of the offense; fourth, because of error of the court during the trial in this, to wit; that at the proper time the prisoner presented to the court, and asked it to give the jury the following instructions in writing:

“The information charges the defendant with the offense described in section nine of the statute of felonies; that is, with committing an assault and battery with intent to rob. Such is the offense laid. Now, if you believe, from the evidence, that the defendant is guilty, not as charged in the information, but of robbery, as distinct from the offense for which the defendant has been on trial, then you ought to return a verdict of not guilty of the offense charged, because there is a fatal variance between the offense charged in the information and the offense proved, and there being but one count in the information, charging a specified offense, the defendant cannot, under that information, be found guilty of another distinct offense, containing merely some of the elements of the offense charged;’ which instruction the court refused to give the jury, on which grounds the defendant asks a new trial.”

The first question for our consideration and decision is as to the correctness of the instruction given by the court to the jury, to the effect that the declaration of the defendant, while the act was being committed, that Justice, some three years before that time, had assaulted him and drawn a pistol on him, and that he was then having his revenge for it, was not evidence, and could not be considered by the jury.

It is well established by the authorities, that in all cases,

civil or criminal, where evidence of an act done by a party is admissible, his declarations, made at the time, having a tendency to elucidate, explain, or give character to the act, are also admissible. They are a part of the transaction, and for that reason are admissible; and it makes no difference, so far as the admissibility of the declaration is concerned, whether it be in favor of, or against the party making it. If the act is one of alleged criminality, and the accompanying declaration tends to show it to be innocent, it is equally admissible as where the tendency is to show the criminality of the act; and it may be given in evidence by the defendant as well as by the State. *Sessions v. Little*, 9 N. H. 271; *Russell v. Frisbie*, 19 Conn. 206; *Yarborough v. Moss*, 9 Ala. (N. S.) 382; *Elkins v. Hamilton*, 20 Vt. 627. Starkie on Ev., by Sharswood, p. 421; 1 Greenleaf Ev., sec. 108.

In the case under consideration, the testimony, so far as material to be noticed, was in substance as follows: Justice testified that he met, and repeatedly drank with the defendant, previously a stranger to him, in the town of Crawfordsville; afterward, at the request of the defendant, he went with him to a grove, a little way out of town, near to the railroad, where they sat down on a log together; that, while they sat there, the defendant pushed him off the log, struck him several times, put his hand in his pocket, in which he had previously had the five dollar bill, and struck him with a stone, rendering him insensible; that when he recovered his consciousness he was talking with some women, at the long house, the other side of the railroad cut; that he felt in his pocket for the money and it was gone.

The State then introduced Mrs. Middleton, who testified, in substance, that the first she knew of the affair she was at her house, the other side of the railroad cut, where she saw two men running toward her house; the one in front was all bloody, the defendant was running after him. He overtook and knocked him down, and commenced kicking him. She ran down and spoke to Hamilton; he kept on beating him; he said the man "about three years ago had assaulted him,

and drawn a pistol on him, and he was paying him up for it now—having his revenge," etc. Mrs. Plush, another witness on behalf of the State, testified to the same, in substance.

This is the declaration of the defendant, which the court excluded from the consideration of the jury.

If the portion of the transaction testified to by the female witnesses had been offered in evidence by the defendant, it might have been a question whether it would have been admissible or not. But it was introduced in evidence by the State; and we think the State was not entitled to prove the acts of the defendant, and rely upon them, and have his declarations, made at the same time, in explanation of the acts, excluded from the consideration of the jury. We cannot tell to what extent the occurrence, spoken of by the female witnesses, contributed to satisfy the jury of the defendant's guilt. His declaration, made while engaged in the acts proved, was proper evidence in his favor for what it was worth.

The next question is as to the correctness of the action of the court, in holding that it was immaterial whether the prosecuting witness had, or had not, any money at the time of the alleged attempt to rob him. In *The State v. Swails*, 8 Ind. 524, it was held by this court that one who fired a gun at another, not charged with anything but powder and a light cotton wad, at a distance of forty feet, it appearing that the life of such person was not at all endangered or put in jeopardy by the act, in consequence of the manner in which the gun was loaded, could not be convicted, although he might have thought that the gun was properly loaded with powder and ball, and although he may have intended to murder.

The court, in that case, say: "It is true that the law aims to punish the intent. That Swails, in this case, had a felonious intent, cannot be doubted. But he lacked the ability and the means to carry the intent into execution. To constitute an assault, the intent and the present ability to execute must be conjoined. Thus, in this case, there was

the intent, but not the power. Had the gun been loaded with ball, or any other destructive missile, the offense charged would have been complete. Such shooting, with a gun properly loaded, would be one or another grade of crime, according to the result. To shoot at and miss Lee would have been an assault with intent to murder. To shoot and wound, an assault and battery with like intent. To shoot and kill would have been murder. But to shoot at the distance of forty feet, with an ordinary charge of powder and wad, no matter under what supposition or with what intent, was not either of these grades of crime. The present ability to accomplish the felonious purpose was wanting."

This case has been criticised. 1 Bishop Crim. Law, sec. 677. With what degree of justice, we need not stop to inquire. It was also under consideration in this court, in the case of *Kunkle v. The State*, 32 Ind. 220, and, by a divided court, somewhat limited in its application. It was evidently put on the ground that the first step toward the commission of the crime was not shown; that is, the perpetration of the assault or assault and battery, and that, consequently, the next step—that is, the inquiry into the intention of the party—was inadmissible. The ordinary and received definition of an assault is that which is now incorporated in our statute, viz: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

In this view of this case, it has the support of those cases which hold that it is no assault to present at a person a gun or pistol which is empty, or to present or discharge one charged with harmless materials. See 1 Russell Crimes, 750, *et seq.*

The position contended for by counsel for the appellant in the case under consideration would lead to consequences which forbid our adoption of it. A robber supposes that an individual has a well filled pocket-book or a valuable watch on his person, and resolving to possess himself thereof, he meets the individual; with a slung-shot, or a

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bludgeon, he knocks him down, searches his pockets, and fails to find that which he expected to find. Shall it be held that he is guilty of a misdemeanor only? He has taken the first step; has taken it with the intent to commit the crime of robbery, and is clearly, in our opinion, within the statute on which the information is founded.

We approve and adopt the language of GRAY, J., in *Commonwealth v. Jacobs*, 9 Allen, 274: "Whenever the law makes one step toward the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." See the authorities cited in the last named case. The common pleas committed no error on this point.

The remaining question is, did the court err in refusing to charge the jury that if the evidence showed that the defendant carried out his intention, by completing the crime of robbery, the jury ought to acquit him of the crime charged in the information? On this point, the position taken by counsel for the appellant is, that if the prisoner consummated the crime, then the assault and battery, with intent to rob, was merged in the crime of robbery, and the defendant could be prosecuted for robbery only. The cases to which counsel for the appellant have referred us are not in point. They are cases where the inferior offense was a misdemeanor and the higher crime a felony. It has never been held that offenses of equal grade can merge the one in the other. If both are misdemeanors, or both felonies, there can be no merger. 2 Bouvier's Law Dic. 175; 2 Russell Crimes, 433; 1 Whart. Amer. Cr. Law, sec. 564.

By statute, in this State robbery and an assault, or assault and battery, with intent to commit robbery, are both felonies, and the punishment therefor is the same. It is difficult,

therefore, to see any reason for saying that one is of a higher degree of criminality than the other, or how one could merge in or be absorbed by the other.

Without expressing any opinion on the question, whether the doctrine of merger, as it relates to criminal offenses, would be recognized in this State, we may say that the later determinations of the courts of England seem not to favor the doctrine, and in many of the states of the union it is held not to be the law. *Regina v. Neale*, 1 Den. C. C. 37; 1 Whart. Amer. Cr. Law, sec. 564.

It is sometimes the case that the same evidence would sustain a prosecution for the violation of any one of two or more statutes. In the "*Bank Prosecutions*," as they are styled in the report—1 Russell & Ryan, 378—where the defendants were indicted for the crime of having in possession and putting away Bank of England notes, with intent, etc., knowing them to be forged, which was punished capitally, and also for having the same notes in their possession, knowing them to be forged, which was a transportable offense, it was held that the prosecution might abandon the capital cases and proceed on the indictments for the transportable offenses; and that, although facts sufficient to support the capital charge were made out in proof, an acquittal for the minor offense ought not to be directed, because the whole of the minor offense was proved, and it did not merge in the larger.

In such cases the State has the right to elect on which statute she will proceed, and it is not for the defendant to say that he shall not be punished under the statute on which the State has chosen to bring him to trial. In such cases the defendant cannot be twice punished for the same offense. Where the same facts will make out a case under either statute, and the State has elected under which she will proceed, and the defendant has been convicted or acquitted, this is a bar to a further prosecution. 1 Whart. Amer. Cr. Law, secs. 565, 566; 1 Russell Crimes, 829 to 832.

The court committed no error in giving the instruction

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on the last point, and refusing that asked by the defendant. But, on account of the exclusion by the court of the declaration of the defendant, in connection with the acts proved by the State, the judgment must be reversed.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial, and the clerk is directed to certify to the warden of the prison as required by statute.

L. Wallace and *G. D. Hurley*, for appellant.

B. W. Hanna, Attorney General, and *W. T. Brush*, for the State.

 VATER v. LEWIS.

PROMISSORY NOTE.—*Pleading.*—*Admission.*—*Estoppel.*—*Designation.*—In a suit on a promissory note payable to the order of A., "treasurer of the I. M. B. Co.," the complaint alleged that the note was made to the treasurer of the Indianapolis machine brick company, and no denial was filed to the complaint; *Held*, that the averment must be treated as admitted; and that the defendant having contracted with the corporation was estopped to deny its existence.

Held, also, that the word "treasurer" in such note was not simply a description of the person, but of the office he held in the corporation.

INTERROGATORIES TO JURY.—*Venire de Novo.*—Where a general verdict is returned, and the answers to special interrogatories, also returned, are not signed by the foreman, and the jury is discharged without objection, it is too late for a motion for a *venire de novo*, for that omission.

APPEAL from the Marion Circuit Court.

WORDEN, C. J.—Action by the appellee against the appellant. Issue, trial, verdict, and judgment for the plaintiff below.

The complaint alleges that the defendant, on, etc., "by his note, a copy of which is filed herewith, promised to pay, thirty days after the date of the said note, to the order of Charles W. Smith, Treasurer of the Indianapolis Machine Brick Company, under the style of the I. M. B. Co., sixteen hundred and sixty-nine dollars and twenty-five cents, who before

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the maturity thereof endorsed said note to the plaintiff, a copy of which endorsement is also filed herewith; that said note was payable at the office of the Indianapolis Branch Banking Company, a bank of discount and deposit in said city of Indianapolis, in the State of Indiana," etc.

The note copied is as follows:

"\$1669.25. INDIANAPOLIS, August 7th, 1867.

Thirty days after date I promise to pay to the order of C. W. Smith, Treasurer of the I. M. B. Co., sixteen hundred and sixty-nine dollars and twenty-five cents, with interest at the rate of ten per cent. per annum after maturity. Attorney's fees if suit be instituted on this note; negotiable and payable at the office of the Indianapolis Branch Banking Co. Value received, without any relief whatever from valuation or appraisement laws. The drawer and endorser severally waive presentment for payment, protest, and notice of protest of this note.

(Signed)

THOMAS J. VATER,"

The note is endorsed, "C. W. Smith, Treasurer I. M. B. Co."

The following is the sole answer in the cause:

"The defendant, Thomas J. Vater, says that the note sued on was executed without any consideration, and was not purchased by the plaintiff or endorsed to him before the maturity thereof, and that the plaintiff had full notice of such want of consideration before he became the owner of such note."

Reply in denial. On the issue thus formed, the cause was tried. On the trial the defendant was examined as a witness, and testified, amongst other things, as follows:

"I executed the note sued on. I received no consideration for the note. * * They proposed I should give my notes to the company and the dividends would pay the notes. The notes were given for assessments of stock. * * The former notes were afterwards changed into this note. * * I gave notes for assessment on stock, think about four notes, which were consolidated in this note. Some of the stock-

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holders paid assessments in cash, some not. * * I got the notes which I gave the company when I gave this. The company gave them up when I gave this. All our understandings were verbal ones. * * I took twenty-five hundred dollars stock on verbal conditions. * * This note was given in renewal of other notes of the same amount, which were given in place of four or five other notes which were given for assessment of stock."

After the examination of the defendant had closed, he introduced as a witness William J. Elliott, the Recorder of Marion county, and offered to prove by him that "no articles of association for the Indianapolis Machine Brick Company had ever been filed or recorded in the Recorder's office of Marion county, Indiana, or produced in said office for said purpose." The plaintiff objected to the evidence on the ground that the defendant was estopped by the note to deny the existence of the corporation. The objection was sustained and the evidence excluded, and the defendant excepted.

The evidence offered might have been quite important to the defendant, as it would seem that if the notes were given for stock assessments against the defendant, and if there was no corporation in existence which could issue stock or make assessments on subscribers therefor, there could be no consideration for the note.

We have set out enough of the defendant's evidence to show that the note was given, not upon any transaction between the defendant and said Smith, individually, but upon a transaction exclusively between the defendant and the company. Whatever consideration there was for the note moved from the company and not from Smith, to the defendant. All this appeared to the court by the testimony of the defendant at the time the proposed evidence was offered and rejected.

Another observation should be here made, in order to an understanding of the real question presented. The complaint alleges, that the note was made payable to the order of Charles W. Smith, treasurer of the Indianapolis Machine

Brick Company, under the style of the I. M. B. Co., and this allegation is admitted by a failure to controvert it. In other words, it is admitted that the abbreviations, I. M. B. Co., as used in the note, were used to designate the Indianapolis Machine Brick Company.

Now the question arises whether the defendant, being sued upon a note executed by him, payable to Charles W. Smith, treasurer of the Indianapolis Machine Brick Company, upon a transaction between him and the company, and not upon any transaction between him and Smith as an individual, is estopped by the note to set up the non-existence of the corporation.

We have considered this question with some care, and have come to the conclusion that he is thus estopped.

The note being payable to Smith, treasurer of the Indianapolis Machine Brick Company, implies the existence of a corporation thus designated. *Jones v. The Cincinnati Type Foundry Company*, 14 Ind. 89; *Meikel v. The German Savings Fund Society of Indianapolis*, 16 Ind. 181.

A party contracting with a corporation as such is, when sued upon such contract, estopped to deny the existence of the corporation at the time of making the contract. *Snyder v. Studebaker*, 19 Ind. 462, and authorities there cited.

These propositions are all plain enough, but the more troublesome and doubtful question is, whether the contract should be regarded as having been made between the defendant and the corporation, or between the defendant and Smith, individually, regarding the words treasurer, etc., as merely descriptive of his person; for if the contract be deemed to have been made between the defendant and Smith as an individual, the ground of estoppel would not exist, unless, indeed, it should be held that the estoppel would prevail whether the contract was made directly with the corporation or with another for the use of the corporation.

We have concluded that the contract in the case before us was with the corporation, and not with Smith as an individual. We are quite well aware that there are authorities

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against the conclusion at which we have arrived, but there are authorities that sustain it. In the conflict of decisions we are at liberty to follow that line which will be most likely to carry out and effectuate the real intention of the parties. Here is a note payable to C. W. Smith, treasurer of the Indianapolis Machine Brick Co., given on account of transactions between the maker and the company, in which Smith, as an individual, had no interest. Now, to say that the contract was not with the company, but with Smith, individually, and that his designation as treasurer, etc., was merely a description of him, so that he, being one only of all the great family of Smiths, might be known and identified as the payee of the note, would be a perversion of the evident intention of the parties.

We come to the authorities which sustain our view. In the case of *Babcock v. Beman*, 1 E. D. Smith, 593, a note payable "to the order of R. Beman, treasurer," he being treasurer of the Union Manufacturing Company, was held to be the note of the corporation. The court say, after discussing cases involving the liability of parties as makers, "where, however, the note is made payable to an individual, as an officer of the corporation, a different rule has been applied. Such a note, without any indorsement from the payee, has been held to be the property of the corporation of which he was the officer (1 Denio, 608; 3 Barb. S. C. R. 523), and actions were maintained in the name of the corporation." This case was affirmed by the court of appeals. 1 Kern. 200.

In the case of *The Waterliet Bank v. White*, 1 Denio, 608, it was held that the indorsement of a note to "E. Olcott, cashier, or order," was an indorsement to the bank of which he was cashier.

In *Wright v. Boyd*, 3 Barb. S. C. 523, a bill drawn in favor of "J. H. Lathrop, cashier, or order," was held in law to be drawn in favor of the bank of which he was cashier.

We quote also the following passage from the opinion of the court, in the case of *Barlow v. Congregational Society in Lee*, 8 Allen, 460. "It has been adjudged by the Supreme

Court of the United States, as well as by this court, that on commercial paper payable to 'A. B., cashier,' the bank, although not named in the instrument, might maintain an action. *Barney v. Newcomb*, 9 Cush. 46; *Baldwin v. Bank of Newbury*, 1 Wal. 234. Whether those decisions stand upon the peculiar relation between a bank and its cashier, or (as the opinions imply) upon a general right of any principal to sue upon negotiable paper made to his agent, we need not here inquire."

As the contract, in the case before us, was, in legal contemplation, made between the defendant and the corporation, it follows that the defendant was estopped from alleging the non-existence of the corporation at the time he made his contract; and hence the evidence offered was properly rejected.

It may be observed that no point was made in the case, and we make none, as to the sufficiency of Smith's indorsement to transfer the note to the plaintiff. It is claimed, however, by the appellant that the complaint charges that the note was made payable to Smith, and not to the company, and, therefore, that it cannot now be insisted that it was payable to the company. We have set out enough of the complaint to show that there is nothing in this point.

The complaint alleges that the note was made payable "to the order of Charles W. Smith, treasurer of the Indianapolis Machine Brick Company," and that allegation leaves the question to be determined by the law, whether it was payable to Smith or the company. To be sure, it is further alleged that Smith indorsed it to the plaintiff, and the copy of the indorsement set out shows that he did that as treasurer of the company. There is nothing in all this that binds the pleader to the construction, that the note was payable to Smith and not to the company.

It is assigned for error that the court refused some instructions asked by the defendant, but in recurring to the motion for a new trial, we do not find that that was made a ground of the motion.

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The appellant also assigns error upon the giving of instructions. The only objection made to the instructions given is, that they assume that the note was payable to the company. In this there was no error.

The jury were directed, if they found a general verdict, to return answers to certain interrogatories propounded by the defendant. They found a general verdict, and returned answers to the interrogatories, but the answers were not signed by the jury or the foreman, and the jury were discharged without objection. Afterward, the defendant moved for a *venire de novo*, because the jury had not signed the answers to interrogatories, but the motion was properly overruled. The defendant should have objected to the discharge of the jury until the answers were signed, and failing to do so, he cannot object that answers were not returned to the interrogatories. He should have insisted that the jury be required to return answers properly signed before being discharged. *Noble v. Enos*, 19 Ind. 72; *McElfresh v. Guard*, 32 Ind. 408.

The answers to the interrogatories, not being signed, were no part of the verdict; hence, a motion for judgment for the defendant thereon, notwithstanding the general verdict, was properly overruled.

The only remaining question to be considered is, whether the verdict is sustained by the evidence, and we are of opinion that it is thus sustained. It must be borne in mind that the note imports a consideration, and the *onus* lay upon the defendant to show that there was none. It is not clear that the evidence even preponderated in favor of the defendant.

The judgment below is affirmed, with costs.

J. T. Dye and A. C. Harris, for appellant.

A. G. Porter, B. Harrison, and C. C. Hines, for appellee.

RALEIGH v. TOSSETT.

PLEADING.—*Sham Answers.*—*Interrogatories.*—The court cannot examine the answers to interrogatories to determine whether an answer is a sham pleading or not.

CONTRACT FOR BUILDING.—*Material-Men.*—Where A. contracted for the building of a house and its delivery to him free from all liens of material-men, and took a bond to that effect from B., with sureties, and B., after partly erecting the building, abandoned his contract, being indebted to A. for over payment, and assigned the contract to C., one of his sureties, who completed the building;

Held, that A. was not rendered liable to one who had furnished materials to the building, by reason of a notice of such fact served upon him after he had thus overpaid B.

APPEAL from the Vanderburg Circuit Court.

BUSKIRK, J.—An opinion in this cause was filed with the clerk of this court, on the third judicial day of November term, 1871, reversing the judgment of the court below; but such opinion was lost before it was certified to the court below or entered upon the judgment docket, which imposes upon us the necessity and labor of writing another opinion.

This action was brought by the appellee against Richard Raleigh, Crist, and Linxwiler. The complaint, as amended, is in two paragraphs. The first paragraph is, in substance, as follows:

On the 30th of September, 1867, Raleigh employed Crist and Linxwiler, partners under the firm name of Thomas Crist & Co., to furnish the materials and build him a house. The contract was reduced to writing, and is made an exhibit. On the 27th of December, 1867, under the contract, Crist & Co. had inclosed the building and done other work thereupon, and Raleigh was indebted to them at that time, in the sum of one thousand dollars. Between the 30th of September and the 27th of December, 1867, the appellee, at the instance of Crist & Co., had furnished and delivered one hundred and seventy-five thousand bricks, which were used in the erection of the house. The bricks were furnished in

Raleigh v. Tossett.

conformity with the contract between Raleigh and Crist & Co. The appellee was to have received, on the 1st day of November, 1867, six dollars and seventy-five cents per thousand for the bricks, only four hundred dollars of which had been paid, leaving a balance due and unpaid of seven hundred and eighty-one dollars and twenty-five cents. In addition to the one thousand dollars, Raleigh, on the 27th of December, 1867, still held the title to a tract of land of forty acres, valued at three thousand dollars, which Crist & Co. were to take in part payment for the building of the house. On the 21st of December, 1867, the appellee served upon Raleigh notice, in writing, that he would hold him responsible for the balance on the bricks, etc. The notice is made an exhibit. Prayer for judgment, etc.

The second paragraph contains substantially the same as the first, with the following additional averments: Raleigh was to pay Crist & Co. ten thousand dollars for the erection and completion of the house, seven thousand dollars to be paid in seven equal instalments of one thousand each as the work progressed, and three thousand in a tract of land containing forty acres, which was to be conveyed by deed upon the completion of the building. On the same day, and at the time of the making of the contract between Raleigh and Crist & Co., the latter, together with John F. Glover, J. W. Kegan, and Jacob H. Miller as sureties, executed to Raleigh their bond in the sum of six thousand dollars, the conditions of which were that Crist & Co. should well and faithfully erect and complete the building according to the plans and specifications of H. Mursina, architect, and deliver the same to Raleigh, clear from all liens, incumbrances of any and all material-men, sub-contractors, employees, and all other persons whomsoever. The bond is made an exhibit. On the 21st of December, 1867, Raleigh was indebted to Crist & Co., on the contract, in the sum of eight hundred dollars, besides the forty acre tract of land. On that day the appellee served on Raleigh a notice in writing, setting forth the indebtedness of seven hundred and

eighty-one dollars and twenty-five cents for the bricks with which Raleigh's house had been built, and that he would hold him responsible for the payment of the same. Prayer for judgment.

Crist and Linxwiler made default, and Raleigh answered in one paragraph. The answer is, in substance, as follows:

At the time the notice was given to Raleigh, Crist & Co., for want of means or credit to enable them to prosecute their contract for the building of the house, closed the building up and abandoned it. At that time Raleigh had paid Crist & Co. six thousand dollars, which was more than was due to them under the contract; that John F. Glover, who was the surety for Crist & Co. for the fulfilment of the contract for the building of the house, with the assent of Raleigh, took an assignment of the contract, took possession of the building, and in good faith, with his own means, completed the contract. The cost and reasonable value of labor and materials required to complete the building, which was done and finished by Glover, was more than one thousand dollars added to the value of the forty acres of land, to wit: more than four thousand dollars; that Glover took the assignment immediately after the service of the notice on Raleigh, and before anything had become due to Crist & Co., after the service of the notice and after the abandonment by Crist & Co. Glover, after the service of the notice, and after the assignment, with his own means completed the house. Raleigh paid the unpaid one thousand dollars to Glover, and conveyed to him the forty acres of land.

The plaintiff moved the court to strike out the answer of Raleigh, as being a sham answer; and in support of the motion read the interrogatories filed with the complaint, and the answers of Raleigh thereto.

Among the interrogatories and answers thereto are the following:

Interrogatory 6. "How long did the defendant, Thomas Crist, continue to work on said building after you received said notice from the plaintiff?"

Answer to 6. "Said Crist closed the house about the 1st of January, 1868, as stated above, and did not afterward have control of the job, as I understood the matter. Thomas Crist worked afterward at the carpenter and joiner work of the house, as I understood from the parties and believe to be true; he worked under the direction and control of Glover after January aforesaid."

Interrogatory 8. "How much money did you pay out, and to whom did you pay it, to have the materials furnished and the work and labor done, which ought to have been done by the contractors after Crist ceased to work?"

Answer to 8. In answer to the eighth interrogatory, said respondent says, "that he paid out upon said contract, after said Crist ceased to carry on the building of said house, the sum of one thousand and sixty-three dollars and ninety-nine cents; I paid it to John F. Glover, as I was informed and believed, who had taken an assignment of the contract from Crist for building the house, and who completed the building after Crist stopped for want of means or credit to finish the job, his men refusing to work for him, because they would not trust him."

Interrogatory 9. "How did you finish said building after the defendant, Crist, ceased work? Did you let it out on contract, and if yea, to whom did you let, and how much did you pay?"

In answer to the ninth interrogatory, respondent says: "I had nothing to do with completing the contract, except to pay for it. Glover, being the surety of Crist for the performance of the contract for building the house, took charge of the building and carried it out, and I paid him the unpaid money when he took charge of the same, as stated in answer to the eighth interrogatory."

Interrogatory 12. "What have you done with the three thousand dollar tract of land described in the contract, which was to have been conveyed on the completion of said building?"

Answer to 12. In answer to said twelfth interrogatory,

respondent says: "Said tract of land was conveyed to John F. Glover, represented to me to be the assignee of the contract for said building, upon the completion of said contract. Said conveyance was made to said Glover by direction of Crist, who, as well as Glover, represented that Glover had an assignment of said contract, and was entitled to said conveyance for work and materials done and furnished upon said house."

Interrogatory 14. "Did you not, after you received said notice, give up said contract for completion to John F. Glover, one of the sureties on the bond of Thomas Crist & Co.? If yea, on what terms did you let him take it, and how much have you paid him on that account?"

Answer to 14. In answer to the fourteenth interrogatory respondent says: "He had no contract with Glover, except as the surety of Crist upon a bond given to secure the performance of the original contract. When Crist became unable to carry out the contract, Glover took it up and carried it out, and I paid him."

Interrogatory 16. "Did you not suffer Glover, by reason of an arrangement between him and the defendant Crist, to go on and finish the house without your having anything to do with their arrangement?"

Answer to 16. In answer to the sixteenth interrogatory respondent says: "I did."

The court overruled the motion to strike out, and the plaintiff excepted. The plaintiff then demurred to the answer, and the court sustained the demurrer, and Raleigh excepted, failed to answer, and stood upon the demurrer. The plaintiff proved his damages, and took a joint judgment against all the defendants for the balance due, to which Raleigh excepted.

The appellee has assigned as a cross error the overruling of his motion to strike out the answer of Raleigh. Did the court err in overruling the motion to strike out the answer? We are of the opinion that the ruling of the court was correct. There is nothing upon the face of the answer to show

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that it was a sham pleading, and it has been several times decided by this court, that the lower courts cannot examine interrogatories filed in a cause, to determine whether a pleading was sham.

The appellant has assigned for error the sustaining of the demurrer to his answer. Do the facts stated in the answer constitute a defense to the action?

This was a proceeding under section 649 of the code, as amended by the act of March 11th, 1867. 3 Ind. Stat. 335. The object of the action was to enforce a personal liability against Raleigh. The facts were these: Raleigh contracted with Crist, Linxwiler & Co., to construct a house for him. Glover, Kegan, and Miller became the sureties of Crist & Co., in a bond to Raleigh, conditioned that Crist & Co. should well and faithfully erect and complete the building according to the plans and specifications of H. Mursina, architect, and deliver the same to Raleigh, clear from all liens, incumbrances of any and all material-men, sub-contractors, employees, and all other persons whatever.

Crist & Co. partially performed their contract, but did not complete the house. They abandoned the contract and ceased to work. They assigned the contract to Glover, who was one of their sureties on the bond, and he completed the house. The appellee, under a contract with Crist & Co., furnished materials that were used by them in the construction of the said house. The appellee served notice on Raleigh, that he held him personally liable for the value of the materials so furnished. This action was to enforce such personal liability. Under section 649, Raleigh was liable to the appellee to the amount that was due from him to Crist & Co., at the time when such notice was served upon him, and for such sum as might thereafter be due from him to them. It is alleged in the answer that when the appellee served the notice on him, he had overpaid Crist & Co. If this allegation was true, and the demurrer admitted it was true, Raleigh was not indebted to Crist & Co., at the time

the notice was served, and consequently was not liable to the appellee.

But it is earnestly, and with great ability, maintained by the learned counsel for the appellee, that, upon the facts stated in the answer, Raleigh became indebted to Crist & Co., after he had received notice that the appellee intended to hold him responsible for the amount that was due to him from Crist & Co., for materials furnished. We think otherwise. The contract between Raleigh and Crist & Co., was assignable under our statute. See sec. 1, of Act of March 11th, 1861, 2 G. & H. 658. It is alleged in the answer that Crist & Co. assigned the contract to Glover, who took possession of the building, and in good faith, and with his own means, completed the contract, and received from Raleigh payment for the work done by him after such assignment. The contract was assignable. We are bound to presume that the assignment was made in good faith. When the contract was assigned, Crist & Co. ceased to have any interest therein. By the assignment of the contract, Glover was substituted to their rights, and was clearly entitled to demand and receive from Raleigh payment for the value of the work done and materials furnished by him subsequent to such assignment. We are unable to see upon what principle it can be maintained that Raleigh became indebted to Crist & Co., subsequent to the assignment of the contract.

It is true, that upon the failure of Crist & Co. to perform the contract, Raleigh might have elected to regard the contract as rescinded, and might have employed some third person to complete the building, and might have sued upon the bond that was given him, but he was not bound to do so.

But it is also maintained by the appellee, that Raleigh is liable to him, because he holds the bond of Crist & Co., with Glover *et al.* as his sureties, with the conditions hereinbefore set out. This is not an action upon the bond, and consequently we are not required to determine whether the appellee has the right to resort to such bond, and as to such point we decide nothing. This is not a proceeding to enforce

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a mechanic's lien. It is an action to enforce a personal liability against the appellant. We are of the opinion that it sufficiently appears from the answer, that Raleigh was not indebted to Crist & Co. at the time he received the notice, and that he did not thereafter become indebted to them.

We think the answer was good, and that the court erred in sustaining the demurrer to it.

The judgment is reversed, with costs, and the cause is remanded, with directions to the court below to overrule the demurrer to the answer, and for further proceedings in accordance with this opinion.

A. Iglehart and J. E. Iglehart, for appellant.

J. M. Shackelford and W. F. Parrett, for appellee.

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36	302
138	195
36	302
146	340

CONTRACT.—*Mistake.*—*Correction of.*—To entitle a plaintiff to have a mistake in reducing the terms of a contract to writing corrected, it is not necessary that he should allege and prove that the mistake was such as he could not have obtained a knowledge of by reasonable diligence when he was put on inquiry.

SAME.—*Reformed.*—*Specific Performance.*—Although a plaintiff cannot have specific performance of a written contract, with a variation upon parol evidence, still he may, under the code, in the same action, upon parol evidence, have the written contract reformed and enforced.

SAME.—*Suit to Cancel Deed.*—*Title to Land.*—Where the object of a suit is to reform a contract, and to set aside and cancel a sheriff's deed taken by the defendant, in violation of the terms of the agreement, the deed conveying whatever interest the plaintiff had in the property, it is not necessary for the plaintiff to show a title to the land conveyed to have been in him, to entitle him to the relief he demands.

APPEAL from the Gibson Circuit Court

WORDEN, C. J.—This was an action by the appellee against the appellant. Issue, trial, finding, and judgment for the plaintiff.

Two errors only are assigned: first, in overruling a demurrer to the complaint; and, second, in overruling a motion for a new trial.

The complaint is long, but we will make a condensed statement of it, sufficient to present the point in reference to which objection is made.

It alleges that certain described lands of the plaintiff were sold on execution issued upon a judgment rendered in that court against the plaintiff, and that the defendant became the purchaser thereof for the sum of ten dollars; that at the time of the sale the plaintiff was indebted to the defendant in two notes secured by mortgage on the premises, and the land was subject to some other incumbrances; that before the time had expired for redemption, for the purpose of settling the debt due from the plaintiff to defendant, and other mortgages on parts of the property, and also for the purpose of paying to and settling with the defendant for the sum necessary to redeem the property from the sale, it was agreed between the plaintiff and the defendant, that the plaintiff and his wife should convey to the defendant a specified portion of the land, the deed to be executed as soon thereafter as practicable; in consideration whereof, the defendant was to pay a mortgage on the land, due to one Smith for about eight hundred dollars, also a mortgage to one Donald, about forty dollars; also to cancel and surrender the two notes and mortgages held by the defendant against the plaintiff before mentioned; it was also agreed that the above mentioned conveyance from the plaintiff and his wife to the defendant was to be in full payment of the sum due the defendant as the amount necessary to redeem the land from the sale, and that the defendant should have no further right or title to the land by virtue of the sheriff's sale or the certificate of purchase; it was further agreed that the notes and mortgages held by the defendant against the plaintiff should not be surrendered up and cancelled until all judgments, which were liens upon the property, should be fully paid and satisfied; that the contract was

reduced to writing and executed by the parties in duplicate, a copy of which is set out, "but by error and mistake in the drafting of said writing, it was omitted to be stated therein that the conveyance of the real estate, so to be executed by the plaintiff to the defendant, was to be in full payment to the defendant of the sum due to the defendant as the amount necessary to redeem the real estate so sold by the sheriff as aforesaid from said sale, while in truth, and in fact, such stipulation and agreement was a part of said contract and agreement, and should have been so expressed in said writing."

The complaint further avers that the plaintiff, with his wife, did execute and deliver to the defendant the conveyance stipulated for, satisfied the judgments, and fully performed his part of the contract; but the defendant, well knowing the premises, and wrongfully intending and contriving to cheat and defraud the plaintiff, and well knowing that by the conveyance of the plaintiff and his wife, to the defendant as aforesaid, the property had been redeemed from said sheriff's sale, did, at the expiration of the time allowed by law for redemption, procure a deed for the premises so purchased on execution from the sheriff, thereby fraudulently intending to cheat and defraud the plaintiff out of that part of the property not conveyed by the plaintiff and his wife to the defendant, as aforesaid; that the plaintiff has requested the defendant to convey to him the property last mentioned, which he refuses to do, but avows his intention to keep and hold the title to the same to his own use; wherefore, etc.; prayer for reformation of contract, and for specific and general relief.

Two objections are made to the complaint, which will be considered in their order.

First, "that to entitle a plaintiff to have a mistake in a written agreement corrected, he must allege and prove that the mistake was such as he could not have obtained a knowledge of by reasonable diligence when he was put on inquiry," citing 1 Story's Equity, sec. 3, 146, 149. The objection, we think, is not well taken. The authority cited does

not sustain the position. The author cited is discussing mistakes of fact in relation to the subject-matter of the contract, and not mistakes in putting the contract into writing.

Second. "It is a principle of equity jurisprudence that parol evidence is admissible to rebut, but not to raise, an equity. To resist specific performance, a defendant may show that the written contract, by mistake, does not contain all the agreement intended, but a plaintiff cannot have specific performance of a written contract with a variation upon parol evidence."

We concede that a plaintiff cannot have "specific performance of a written contract with a variation upon parol evidence," but the written contract may be reformed upon parol evidence, and then specifically enforced as reformed; and since the code, it may be reformed and enforced in the same action. 2 G. & H. 98, sec. 71. *Rigsbee v. Trees*, 21 Ind. 227; *Rhode v. Green*, 26 Ind. 83.

There can be no doubt that if the written agreement had contained the portion of the contract alleged to have been, through mistake, omitted, the plaintiff would have been entitled to relief against the title thus sought to be acquired by the defendant through the sheriff's deed. The objections to the complaint are both insufficient.

The question on the motion for a new trial relates alone to the sufficiency of the evidence to sustain the finding. The evidence is, to be sure, in some respects conflicting, but we think it is sufficient to sustain the finding. The general facts of the case were fully proved. The nature and general features of the transaction were such as to require no very strong extrinsic evidence to show that it was the intention of the parties that, in virtue of the arrangement made, the right of the defendant, under his purchase at the sheriff's sale, was to be surrendered. The plaintiff swears that it was agreed that the redemption money was to be considered as paid. The plaintiff, with his wife, conveyed to the defendant one hundred and twenty acres of the land, leaving

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only eighty acres in himself. The amount originally paid by the defendant for the whole land was only ten dollars. The whole land, consisting of several parcels, and containing two hundred acres, was offered and sold altogether, without having been offered in parcels, and bid off at the nominal sum above stated, as is shown by the sheriff's deed. The entire arrangement between the parties carries with it the irresistible inference that it was the intent of the parties that the defendant should have the one hundred and twenty acres, free from all liens, except such as he assumed to pay, and that the plaintiff should retain the eighty acres free from any claim of the defendant, on account of his purchase at the sheriff's sale. There can be no doubt that the plaintiff so understood the contract, and supposed, until he learned that the defendant had taken the sheriff's deed, that the omitted portion of the contract had been embodied in the writing. And we think it may be fairly inferred from the statements and conduct of the defendant, that he also understood the contract or arrangement as a satisfaction of the redemption money, and that he no longer had any claim upon the land other than that so conveyed to him by plaintiff and his wife; and that he supposed that the omitted stipulation was embodied in the contract, or that such was the legal effect of the contract as written; and hence it may well be inferred that the omission was the mutual mistake of both parties. See *Nevius v. Dunlap*, 33 N. Y. 676; *Rider v. Powell*, 28 N. Y. 310.

The sheriff's deed bears date August 19th, 1869. The plaintiff testifies, amongst other things, as follows: "When I talked to Monroe, which was in August, he said he would cancel the mortgages, and he did not know that holding a sheriff's deed could do any harm. I demanded a quit claim deed from Monroe for the eighty acres, but he said he had been put to about thirteen dollars expense. This I offered to pay him if he would make the deed. He said he must see his lawyer first. This was in August, a few days after I discovered the mistake. Afterward, Monroe told me that

his lawyer had told him that it could do him no good now, but might be of advantage some day, and he refused to make me the deed."

John C. Holcomb testifies that, "on the evening of the day the agreement was made, I saw Monroe on the cars and asked him if all the matters between him and Skelton had been settled; he told me everything had been settled between them; I saw Monroe on another occasion, when he said to me again that all matters between him and Skelton had been settled."

On cross examination he said, "I do not know that the eighty acres of land in controversy was particularly mentioned; it was my understanding that was settled; do not remember that Monroe used language to that effect; as near as I can remember, Monroe said it was all settled between them." The statements and conduct thus imputed to the defendant are not denied by him.

We think it may be fairly inferred from the statements of the defendant, that at the time the contract was made he understood it as embracing everything between the parties, including the redemption of the land; and that afterward, upon recurring to the terms of the written contract, and discovering that that was not as full as he supposed, or as the real contract between the parties, he concluded that he would take the sheriff's deed with a view to the possibility of making it available. If such was not his understanding of the contract, why did he say to the plaintiff, when spoken to on the subject, that "he did not know that holding a sheriff's deed could do any harm;" that "he had been put to an expense," etc.; that "he must see his lawyer" before he would quit claim to the plaintiff; and after seeing his lawyer, that he told him "it could do him no good now, but might be of advantage some day." If the contract had not embraced the redemption of the land, and the defendant had not so understood it, when spoken to on the subject by the plaintiff, why did he not say, "I bought the land at sheriff's sale; the time for redemption expired, and you failed to redeem

it; I therefore became entitled to the deed from the sheriff, and, having procured that, the land is mine." This or similar language would have been expected from a man who was not conscious that he had no right to the land.

In addition to the evidence above stated, as to what the contract really was, another witness, Silas Holcomb, testifies as follows: "Know the parties; was present in January, 1869, a short time during the day, when they were talking about a trade in reference to Mr. Skelton's lands and mortgages held against them by Mr. Monroe; they talked some time in my presence; it was my understanding that Mr. Monroe was not to claim the eighty acres now in controversy, and I understood the redemption money, from the sheriff's sale to Monroe, was to be considered as paid in the agreement; they did not conclude the trade while I was with them; was not present when the written agreement was drawn up between them."

On the contrary, the defendant swears that the contract was drawn up just as it was agreed upon; and the scrivener, Peter Maier, who was the attorney for the defendant, and was trying to secure money for him, as he testifies, swears that the contract was drawn just as it was stated over to him by the parties.

We are not inclined to reverse the judgment for the want of sufficient evidence to sustain the finding, unless required to do so upon a point that remains to be yet considered.

On the trial, it appeared that, previous to the contract between the parties, the eighty-acre tract in controversy had been sold and conveyed by the auditor of the county to Silas Holcomb, by virtue of a school mortgage, and that on the 14th of January, 1870, the said Silas conveyed the same to the plaintiff. Thus Holcomb held the title at the commencement of the suit, but it had been reconveyed to the plaintiff at the time of the trial.

It is insisted that the plaintiff must have owned the land at the commencement of the action in order to recover. If this were an action to recover possession of the land, the

point would be well taken. But the object was to reform the contract, and set aside and cancel the deed from the sheriff to the defendant, and quiet the plaintiff's title as against that deed, and this was all the relief obtained by the judgment below.

Suppose the plaintiff never had any title to the land at all, could the defendant successfully set up that fact as a defense to this suit? The defendant purchased at sheriff's sale the right which the plaintiff had in the land, whatever that right might be, and upon receiving an equivalent for the redemption money, agreed impliedly or expressly to surrender that right back to the plaintiff. In violation of that agreement, the defendant took the sheriff's deed, and the plaintiff brought this action to set it aside. Can the defendant be heard to say in such case that the plaintiff had no title to the land, in bar of the action? Cases quite analogous have been decided by this court. Thus, it has been held that, upon a sale of land on execution, the judgment debtor cannot set up his own want of title to defeat an action by the purchaser to recover possession. *Hobson v. Doe*, 4 Blackf. 487; *Harris v. Doe*, 3 Ind. 494. See, also, *Brownfield v. Weicht*, 9 Ind. 394.

In judicial sales there is no warranty of title. The object of the suit was to put the plaintiff in the position which he occupied, in respect to the title to the land, before the sale by the sheriff, and not to settle the title as between himself and any third person. This object he should be permitted to accomplish without being required to litigate, or in any manner settle the title as between himself and any third person. A third party claiming the land adversely to the plaintiff can have no interest in this action whatever, because the judgment does not affect him.

We are of opinion, that in an action for the purposes here-in sought to be accomplished, the defendant cannot make any question as to the ultimate title to the land; and that the plaintiff is entitled to the remedy, as against the defendant, without having his title in any manner put in issue as between

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himself and third persons, who are neither bound by, nor can take advantage of, the judgment.

If we are right in this conclusion, it follows that the objection made in this respect cannot be sustained.

The judgment below is affirmed, with costs.

C. A. Buskirk, for appellant.

A. C. Donald, for appellee.



86	310
180	338
86	310
180	198

ME-SHING-GO-ME-SIA and Another v. THE STATE and Another.

INDIAN RESERVATION.—*Taxation.—Statute.*—The lands reserved by the treaty between the United States and the Miami Indians, in 1838, to the band of Ma-to-sin-sia and referred to in the treaty of 1840, in which the United States agreed to convey by patent said lands to Me-shing-go-me-sia, in trust for his band, and the personal property of said band, are not liable to taxation for state, county, and other purposes. Nor are these lands included in the ninth section of the act of June 21st, 1852, 1 G. & H. 70.

APPEAL from the Grant Circuit Court.

DOWNEY, J.—This was a proceeding in the nature of a mandate to require and compel the appellant, Gauntt, as county treasurer, to assess the property, real and personal, of the said Me-shing-go-me-sia and other Indians of the Miami tribe in Grant county, and charge the same with the appropriate taxes.

There was a demurrer to the complaint for the reason that it did not contain facts sufficient to constitute a cause of action, and because there was a defect of parties plaintiffs and defendants, in this: first, that the other members of the band mentioned in the complaint are not made defendants; and second, that neither the commissioners of Grant county nor the county of Grant are made parties plaintiffs. This demurrer was overruled, and the defendants excepted. Answer of general denial; trial by the court on an agreed statement of facts.

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The court found for the plaintiffs, that the lands in the complaint specified are liable and subject to taxation for state, county, and other taxes, both current and delinquent; that the personal property of said persons in the complaint mentioned is subject and liable to taxation as the property of other citizens; that the auditor and other officers of said county had failed to cause said lands and property to be placed on the proper duplicate, and charged with taxes as other property; that said lands and property are liable to be, and should be, charged with taxes according to law.

The defendants moved for a new trial, because the decision of the court was not sustained by sufficient evidence, was not sustained by the agreed statement of facts, and because the court overruled the demurrer to the complaint.

This motion was overruled, and the defendants excepted. They then moved in arrest of judgment, which motion was also overruled, and they again excepted.

The court then rendered final judgment. A bill of exceptions sets out the agreed statement of the facts, which was all the evidence in the case.

The errors assigned are, first, the overruling of the demurrer to the complaint; second, overruling the motion for a new trial; third, overruling the motion in arrest of judgment.

Whether the question is decided on the demurrer to the complaint, or on the facts, the case is the same, so far as the main point is concerned. The question is, whether the lands and personal property of Me-shing-go-me-sia and the members of his band are liable to taxation, or not. No other point is argued or urged upon us, and we shall decide no other.

The agreed statement of facts is as follows:

"The lands in question in this suit are a part of a reservation containing six thousand four hundred acres, reserved by the Miami Indians in their treaty of 1838 with the United States to the band of Ma-to-sin-ia, which reserve is again referred to in the treaty of 1840, between the same parties,

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by which, as amended by the Senate, the United States agreed to convey said land by patent to Me-shing-go-me-sia, the son of Ma-to-sin-ia, in trust for his band, who have ever since resided upon the same; that Me-shing-go-me-sia has ever since been the head man, or chief, of his band; that about two thousand two hundred acres of said lands are within the bounds of Grant county, and the balance in Wabash county. About the year 1846, a portion of the Miami tribe of Indians were removed to their present home, west of the Mississippi, now in the state of Kansas, and placed on lands ceded to them by the government. By the terms of the treaty of 1840, Me-shing-go-me-sia and his band were not required to go west, but remained upon said reserve. A few of the Indians, now residing on the lands in question, went, or were removed to Kansas and returned, and some remain without leave and have remained on and about said lands ever since. All of said Indians except those who have deceased have so lived on and about these lands, making their living, working, and farming these lands, and trading with the citizens around them. They have also always received annuities that the government under treaty stipulations has paid them each year, which is referred to in said treaties, including the treaty made with them in 1854.

"Soon after 1845, said Indians commenced improving said lands, which were mostly taken possession of and occupied by the heads of families, and some others commenced making farms, and have continued said improvements from that time to the present. On some of the improvements more, and on others less is cleared. The lands in Grant county contain eleven or twelve farms, and the amount cleared is about one thousand acres. Each Indian making improvements enjoys the proceeds thereof, as also does his family and brothers after him according to the ancient customs of the Miami nation. About the year 1867, their band having had some trouble about individual members selling timber growing on said reservation to the whites, it was determined in general council of the band that no more timber

should be sold by any Indian on lands not by him fenced. Houses and other buildings have been made and are now occupied, some by the Indians, and some by white men, lessees of the Indians. Their ancient customs are considerably broken in upon by the manners and customs of the whites, with whom, however, the Indians hold comparatively little intercourse, from choice.

"They settle their troubles among themselves, without resorting to our courts. In their intercourse with each other they speak their own language. The greater part of them cannot speak the English language intelligibly. Their tribal organization still remains. They still hold their councils for the same purposes as in former times, and are governed by their ancient customs. They do not go to the courts for the settlement of decedents' estates, nor do they have guardians appointed for minors by our courts. They never vote at elections, they have paid neither road nor poll tax. This reserve has never been surveyed or laid off into sections. No part of said reserve has been conveyed by patent from the United States to any or all of said band, or to Me-shing-go-me-sia, in trust for them, but their title thereto remains the same as when the treaty of 1840 aforesaid was perfected. They have a church of which the greater part of them are members. They sue when necessary in our courts, and the rights of other citizens are generally conceded them. The persons (Indians) so occupying said lands have personal property, such as horses, cattle, stock, on their improvements, farming utensils, implements of husbandry, etc.

"All laws, treaties, and history bearing upon this cause are to be considered by the court in determining the questions involved in this suit. These lands are worth about fifty dollars per acre, and said reservation is surrounded by well improved farms. The children belonging to said tribe are not received into the public schools of said county. The marriages between the members of said tribe are governed and celebrated according to the ancient usages of the Miami nation, and not according to the laws of Indiana. They

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obtain no marriage license from the county clerk, as is done in marriages between white persons. The members of said band never resort to the courts for divorces, but their divorces are regulated by the usages of their tribe.

"About three heads of families, residing on their reserve in Wabash county, refuse to act with Me-shing-go-me-sia on account of personal matters. It is hereby agreed by the parties to this action, that the foregoing are the facts in the case. It is also agreed that should the law of the case, under the evidence agreed on, be against the defendants, then their cause shall be decided against them, otherwise in their favor. October 14th, 1870." The clause of the treaty of 1838 referred to is as follows:

"Art 2. From the cession aforesaid, the Miami tribe reserve for the band of Ma-to-sin-ia, the following tract of land, to-wit: Beginning on the eastern boundary line of the big reserve, where the Mississinnewa river crosses the same; thence down said river with the meanders thereof, to the mouth of the creek called Forked Branch; thence north two miles; thence in a direct line to a point on the eastern boundary line two miles north of the place of beginning; thence south to the place of beginning, supposed to contain ten square miles."

The clause in the treaty of 1840, referred to, as amended by the Senate, and afterward assented to, is as follows:

"Art. 7. It is further stipulated, that the United States convey by patent, to Me-shing-go-me-sia, son of Ma-to-sin-ia, the tract of land reserved by the second article of the treaty of the 6th of November, 1838, to the band of Ma-to-sin-ia. And the same provision made in favor of John B. Richardville and family, in the fourteenth article of the treaty of the 6th of November, 1838, is hereby granted and extended to the above named Me-shing-go-me-sia, and to his brothers."

The clause in the treaty of 1838, to which reference is made, is as follows:

"Art. 14. And whereas John B. Richardville, the principal chief of said tribe, is very old and infirm, and not well

able to endure the fatigue of a long journey, it is agreed that the United States will pay to him and his family the proportion of the annuity of said tribe which their number shall indicate to be due to them, at Fort Wayne, whenever the said tribe shall emigrate to the country to be assigned them west, as a future residence."

It is hardly worth our while to enter upon the consideration of the question as to the nature of the title by which these Indians hold this land. It is spoken of in the treaty of 1838 as a reservation to the band of Ma-to-sin-ia. In the treaty of 1840, it is stipulated that the United States convey by patent to Me-shing-go-me-sia. We think it safe to conclude that by the reservation and the conveyance made by the United States, or agreed to be made, the Indians have a title not inferior to that which the tribe possessed before any treaty was made. See *Wheeler v. Me-shing-go-me-sia*, 30 Ind. 402.

It is provided by statute in this State, that "all lands reserved to or for any individual, by any treaty between the United States and any Indian tribe or nation, shall be liable to taxation from the time such treaty shall have been confirmed." 1 G. & H. 70, sec. 9.

It is contended by the appellees that the lands in question are made taxable by this section of the statute. But we think it does not meet the case. It applies to reservations for individuals. This was not a reservation of that kind, but was "for the band of Ma-to-sin-ia." Counsel for appellees refer us also to the case of *Frederickson v. Fowler*, 5 Blackf. 409, as settling the question. But the land held to be taxable in that case was a reservation to an individual, and he had sold the same to a citizen. It was held to be taxable in the hands of such citizen. There was no discussion or decision of the question in that case which is involved in this one.

We are also referred by the appellees to the case of *Roche v. Washington*, 19 Ind. 53. But this point was not involved in that case. The learned judge who delivered the opinion

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said, "The question intended to be presented for our decision in this cause is, whether the courts of Indiana will hold valid, as marriages, such unions, and as divorces, such separations, as those described in the agreed statement of facts, they having been made under, and being sanctioned by, the laws of the Miami tribe of Indians."

Nothing was, or could have been determined in that case, as to the right of the State to tax the lands and other property of the Indians residing on and owning such lands, under treaties with the United States.

It is claimed by the appellees that these Indians have lost their tribal relations by the removal of a portion of their number to Kansas, and that those who remain must be regarded as having become so far intermixed with the whites as to be subject to the same laws.

This is a question, for a solution of which we must look to the action of the government of the United States, and it is primarily a question for the political departments of the government. *United States v. Holliday*, 3 Wal. 407. We think it does not follow, because a part of the tribe have emigrated to Kansas, and the other part remained here, that they are, therefore, no longer a tribe. It does not seem necessary that Indians shall reside upon a common territory, or that their lands shall be conterminous, in order to give them the character of a tribe, or entitle them to the rights and immunities thereof. These Indians remained on their ancient possessions, by and with the consent of the authorities of the United States, while those who emigrated were provided with new homes in another part of the country. No change in the relations of those who remain is in any way indicated. They, or some of them, receive their share of the annuities, at or near their old home, as the others do at their new homes. *The Kansas Indians*, 5 Wal. 737. If they have lost their tribal organization, rights, and immunities, when and how did they lose them? It is for counsel who insist that they have ceased to be a distinct people, and become incorporated with us, clothed with all the rights and bound

to all the duties of citizens, to point out when and how that event took place. Do our laws allow these Indians to participate equally with us in our civil and political privileges? Do they vote at our elections, or are they represented in our legislatures, or have they any concern, as jurors or magistrates, in the administration of justice? Have they ever, in any way, been regarded as members of our body politic? All of these questions must, we think, be answered in the negative. See *Goodell v. Jackson*, 20 Johns. 693.

But suppose these Indians have ceased to be part of their original tribe, does it follow that they have no organization which entitles them to be regarded as a separate people? Does not the treaty of 1838 expressly recognize them as having such organized existence? If not, why is this land reserved to them as "the band of Ma-to-sin-ia"? Receiving these treaties as paramount to any law which the State can enact, we must accord to these Indians an organized and separate existence, and must hold that they have not become incorporated into, and do not form a part of the body politic of the State. But in order to place this matter on other ground, we will examine it a little further. It is provided in the ordinance of 1787, art. 3, as one of the irrevocable clauses thereof, that "the utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

To form the compact entered into by the State with the general government, at the time of the admission of the State into the Union, it was provided by the act of Congress of April 19th, 1816, that the people of the State might form a constitution and be admitted into the union, "provided, that the same, whenever formed, shall be republican, and not

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repugnant to those articles of the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, which are declared to be irrevocable between the original states and the people and states of the territory north-west of the river Ohio." etc.

The territorial legislature assented to this in its ordinance of June 10th, 1816. "That we do, for ourselves and our posterity, agree, determine, declare, and ordain, that we will and do hereby accept the propositions of the Congress of the United States, as made and contained in their act of the nineteenth day of April, eighteen hundred and sixteen, entitled," etc., was the language in which the people of the State of Indiana entered into this irrevocable compact. These are the Indian's *Magna Charta*.

It is now proposed to carry out this agreement by taxing the lands and other property of these Indians. Is this not taking from them their property "without their consent"? Is it thus that "in their property, rights, and liberty, they never shall be invaded or disturbed"? Is this the manner in which "the utmost good faith shall always be observed towards them"?

But we will not extend this opinion by a further examination of the question. We refer, however, to the following cases: *The Kansas Indians*, 5 Wal. *supra*; *The New York Indians*, *id.* 761; *Worcester v. State of Georgia*, 6 Pet. 515; *The Cherokee Nation v. The State of Georgia*, 5 *id.* 1, which we think settle the question against the right to impose the taxes in question.

The judgment is reversed, with costs, and the cause remanded.

J. VanDevanter and J. F. McDowell, for appellants.

J. Brownlee, H. Brownlee, and B. W. Hanna, Attorney General, for appellees.

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ATTORNEY.—*Negligence*.—*Liability*.—A complaint is sufficient, charging that an attorney employed to prosecute a suit for the recovery of valuable land, when a jury had returned a verdict in his favor, took the same and by his negligence and unskilfulness altered the verdict, so as to include only a worthless piece of the property sought to be recovered, and at his request the jury accepted the same as their verdict, to the plaintiff's damage.

APPEAL from the Marion Common Pleas.

PETTIT, J.—The substance of the complaint was, that the plaintiff was the owner of a valuable piece of ground, describing it, in the city of Indianapolis; that one Carlisle was wrongfully in possession of it; that he employed Walpole, who was an attorney at law, to bring and prosecute a suit for the recovery of possession, and damages for its detention. Walpole brought and prosecuted the suit; that the jury in that suit brought in a verdict for the plaintiff for the whole ground, which was of great value; that when the verdict was brought in by the jury, Walpole took and altered it so as to cover a very small and much less, and a totally valueless piece of ground, and asked the jury to find the verdict thus altered, which they did; that this was carelessness, negligence, and unskilfulness on the part of Walpole, by which the plaintiff was damaged in the sum of ten thousand dollars, and for which sum he claims judgment.

A demurrer, for want of sufficient facts, was sustained, and exception taken, and the correctness of this ruling is the only question before us in this case. It is not pretended that an attorney is not liable in damages for his negligence, carelessness, or unskilfulness in his profession, by which his client is injured, and it would be supererogation to cite authorities on this point. But it is contended that the verdict was the jury's and not Walpole's; that all that was done was in the presence, and with the sanction of the court and jury, and that, therefore, Walpole cannot be liable, however much his action may have injured his client.

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We do not concur in this view. If a plaintiff is entitled to recover one thousand dollars, and a jury brings in a verdict for that sum, and the plaintiff's attorney asks the jury to reduce or alter the verdict to five hundred dollars and they do so, can it be contended that for this act he would not be liable to his client? We cannot see that there is any legal difference in the case before us and the one supposed.

We hold that the complaint is good, the unskilfulness, carelessness, and negligence being fully shown in it.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings.

S. E. Perkins and *S. E. Perkins, Jr.*, for appellant.

J. S. Harvey, for appellee.

CROOKE v. THE BOARD OF COMMISSIONERS OF DAVIESS
COUNTY.

TAX.—Railroad.—Notice.—Appropriation.—The notice given by the auditor of the county under the act of May 12th, 1869, authorizing counties and townships to aid in the construction of railroads, must specify the sum to be appropriated; otherwise the election and all subsequent proceedings will be void.

APPEAL from the Daviess Circuit Court.

DOWNY, J.—This was a complaint by Crooke against the appellees to enjoin them from levying a tax under the act of May 12th, 1869, authorizing counties and townships to aid in the construction of railroads, etc. The circuit court refused the injunction. We think it should have granted it. Section three of the act requires that the notice given to the voters, by the auditor, of the election, shall specify the amount to be appropriated. The notice in this instance was defec-

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tive in not giving this information. As this defect renders the election and all subsequent proceedings under it illegal, we will not examine any of the other questions made.

The judgment is reversed, with costs, and the cause remanded.

T. R. Cobb, J. M. Van Trees, and N. F. Malott, for appellant.

J. W. Burton, S. H. Taylor, and J. H. O'Neill, for appellees.

KESLING v. McCALL.

SLANDER.—*Pleading.—Malice.*—In an action for slanderous words spoken of the plaintiff, it is a sufficient charge of malice to aver that "the defendant spoke, uttered, and published the false, scandalous, malicious, and defamatory words following."

SAME.—*Actionable Words and Prefatory Matter.*—Where the plaintiff lived near to and north of the defendant, and the defendant said in regard to some wheat stolen the night before, in answer to a question as to which way the wheat stolen went, "I think it went north. Tom McCall" (the plaintiff) "was here twice the day before to get seed wheat. He enquired whether it was clean enough to sow without being cleaned again. Now I don't want anything to go out from me, that I said that Tom McCall stole the wheat, for I don't know who stole it, but it looks suspicious," it was held that the words were actionable, taken with the prefatory matter. So also were the words, "I saw the man steal my wheat, and saw the way he went, he went across the field north, and it was nobody but Tom McCall."

SAME.—Where there had been a difficulty between the plaintiff and defendant, that still caused ill feeling, and defendant said, "The wheat did not go very far. I would not doubt that it went across the field (nodding his head towards plaintiff's). It looks very suspicious that it went that way, for me and him are not very good friends;" the words were, with the extrinsic facts, held sufficient; also the words, "Tom McCall is the man, and nobody else, that stole my wheat. I saw the man who took it, and can't be mistaken."

SAME.—*Names.—Averments.*—Where it was alleged that the plaintiff in that neighborhood was known by all the community as "Walnuts" and as "the man who deals in walnuts," and the words used were, "I know the man who took my wheat; I know all about it. I saw him take it. You all know him.

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It is the man they call Walnuts;" and again these words: "The man who trades in walnuts stole my wheat;" and again these words: "The man who trades in walnuts took my wheat," and it was not alleged that the persons to whom the words were spoken knew the plaintiff by these names or that they lived in the neighborhood, but that they were "divers good and worthy persons of the county," the words, with the averments, were held not sufficient to sustain an action.

SAME.—*Evidence.—Impression.*—Under the allegation that the words, "me and him aren't very good friends," were used, it was proper to introduce proof of a difficulty between the parties, to identify the one of whom they were uttered. So a question to a hearer as to the impression made on his mind by the words was proper, to obtain the opinion, understanding, or belief of the witness as to the person of whom the words were spoken.

APPEAL from the Delaware Circuit Court.

DOWNNEY, J.—This action was brought by McCall against Keesling for slanderous words spoken of him by Keesling. In order to present the questions which are to be decided, it is necessary to set out the complaint. It is alleged in the first paragraph "that the parties live in said county, the plaintiff living some half mile in a northerly direction from the defendant, across a field. He further avers that on or about the 28th day of September, in the year 1868, at said county, defendant had wheat threshed near his house, and that on the night of said day, at said county, two sacks of his wheat had been, by some one, stolen from defendant; and afterward, to wit: on the next day, at his own house, the said defendant, in a certain conversation in the presence and hearing of certain good and worthy citizens of said county, of and concerning the said stolen wheat, and of and concerning the plaintiff, and of and concerning the plaintiff's character for honesty, in answer to a question put by one to whom defendant was talking, as to whether he, defendant, had any idea as to which way the stolen wheat went, defendant spoke, uttered, and published of and concerning plaintiff and his, plaintiff's, character for honesty the false, scandalous, malicious, and defamatory words, following, that is to say: first set: I (defendant meaning) think it went north. Tom McCall (plaintiff meaning) was here twice the day before to get seed wheat, and inquired whether it was clean

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enough to sow without being cleaned again, and defendant then said: Now, I (defendant meaning) don't want anything to go out from me (defendant meaning) that I said that Tom McCall (plaintiff meaning) stole the wheat, for I (defendant meaning) don't know who stole it, but it looks suspicious. Then and there meaning to be understood by the persons who heard him thus speak, and making the impression upon the minds of said persons, that the plaintiff had been and was guilty of larceny. Second set: and again these words, I (defendant meaning) saw the man steal my wheat, and saw the way he went, he went across the field north, and it was nobody but Tom McCall (plaintiff meaning), thereby then and there charging plaintiff with the larceny of said wheat.

"And for another and second paragraph of complaint, plaintiff avers that before the speaking and publishing of the words as set out in this paragraph, plaintiff and defendant had a difficulty in regard to a business transaction, by reason whereof they were, at the time hereinafter spoken of, not good friends, and plaintiff, at the time that defendant was having his wheat threshed, went over to see defendant about the purchase of some wheat for seed. And plaintiff charges that on the evening of said day two sacks of wheat had been stolen of and from defendant, and defendant and certain persons standing near the straw stacks, in plain view of plaintiff's residence, which was nearest to where defendant and those persons stood, and just across the field, and not very far from where they, the defendant and the persons to whom he was talking, were standing, in a certain conversation to and with those persons, and in their presence and hearing, in speaking of the said stolen wheat, and of and concerning plaintiff and plaintiff's character for honesty, uttered, published, and spoke of and concerning plaintiff and plaintiff's character for honesty the false, scandalous, malicious, and defamatory words following, that is to say: the wheat (the stolen wheat meaning) did not go very far. I (defendant meaning) would not doubt that it (the stolen wheat still meaning) went across the field (nodding his head

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toward plaintiff's); it looked very suspicious that it went that way, for me and him aren't very good friends.

"Second set. And again these words: Tom McCall (plaintiff meaning) is the man, and nobody else, that stole my wheat. I saw the man who took it, and can't be mistaken; thereby then and there meaning to be understood, and so understood by those who heard him thus speak as stated in this paragraph, that plaintiff had been and was guilty of larceny.

"And for another and further paragraph in this behalf, plaintiff says that he lives close to defendant and has resided there for a year and more, and that in that neighborhood he is known by all the community as "Walnuts," and again, as "the man who deals in walnuts;" and whenever any one is called "Walnuts," or spoken of as "the man who deals in walnuts," he, the plaintiff, is understood to be the man alluded to. And he further charges and avers that on or about the last day of September, 1868, at said county, the defendant threshed his wheat, and afterward, to wit, on the next day, gave out in speeches in the neighborhood that the night before he had two bags of wheat stolen, and afterward, to wit, on the day and year last aforesaid, at the county aforesaid, in a certain discourse which he, defendant, had and held with divers good and worthy persons of the county, of and concerning said wheat, which he, the said defendant, said had been stolen, and of and concerning said plaintiff and his, plaintiff's, character for honesty, he, the said defendant, uttered, published, and spoke of and concerning said wheat, and of and concerning said plaintiff and plaintiff's character for honesty, the false, scandalous, malicious, and defamatory words following, that is to say: first set: I (defendant meaning) know the man who took my wheat; I know all about it; I saw him take it; you all know him; it is the man they call "Walnuts" (plaintiff meaning).

"Second set. And again, these words: The man who trades in walnuts (plaintiff meaning) stole my wheat.

"Third set. And again, these words: The man who trades in walnuts (plaintiff meaning) took my wheat.

"Fourth set. And again, these words: Tom McCall (plaintiff meaning) stole my wheat.

"Fifth set. And again, these words, in substance: Thomas J. McCall (the plaintiff meaning) stole my wheat. Then and there, by the speaking of the several sets of words in these different paragraphs mentioned, by the different persons who heard him so speak, then and there understood, and so intended to be understood by those who heard him, that plaintiff had been and was guilty of larceny, to the damage of plaintiff," etc.

The defendant demurred to each paragraph and each set of words in each paragraph of the complaint separately, and his demurrer was overruled, to which he excepted. He then answered in three paragraphs; the first of which was a general denial; the second, a justification, alleging that the plaintiff did steal the wheat; and the third, averring that all the words alleged were spoken by him in answer to inquiries by his neighbors as to whom he suspected of stealing the wheat alleged in the complaint, in good faith.

A demurrer was sustained to the third paragraph of the answer, and there was a reply, by way of traverse, to the second paragraph.

Of the issues thus formed there was a trial by jury, and a verdict for five hundred dollars for the plaintiff. A motion was made by the defendant for a new trial, for the reasons that the court had erred in the admission of certain specified illegal evidence, in refusing certain instructions, and in giving certain other instructions; that the damages were excessive, and the verdict of the jury contrary to law and the evidence. This motion was overruled, an exception taken, and final judgment rendered against the defendant for the amount found by the jury, from which judgment the defendant appeals.

The evidence given on the trial is not all in the bill of

exceptions, nor are any of the instructions given, or of those refused.

The only questions properly presented by the assignment of errors are, first, that the court erred in overruling the demurrers to each set of words, and to each paragraph of the complaint; and, second, in refusing to grant a new trial.

It is urged in the first place that the whole complaint is bad, because it is nowhere alleged that the words were maliciously spoken. It is contended that to say that the defendant spoke, uttered, and published the false, scandalous, malicious, and defamatory words following, etc., is not a sufficient charge of malice. We think differently. In the precedents in 2 Chit. Plead. 633 *et seq.*, this is the form used. And see form No. 17, 2 G. & H. 377.

It is contended that the first set of words in the first paragraph are insufficient because it is admitted that the defendant expressly told the hearers that he did not accuse, or intend to accuse the plaintiff of stealing his wheat, but that his conduct looked suspicious. What the defendant is alleged to have said on that subject is, "Now I don't want anything to go out from me, that I said that Tom McCall stole the wheat, for I don't know who stole it, but it looks suspicious." There can be no question that this conversation related to McCall. His name is mentioned. We think the words of this set, and also the second set, in the first paragraph, in connection with the averments of prefatory matter, are sufficient. In *Drummond v. Leslie*, 5 Blackf. 453, where the slanderer attempted to protect himself by protesting in a somewhat similar form, that he did not intend to say who committed the crime, it was held that while there was not a directly affirmative charge, if the words were calculated to induce the hearers to suspect that the plaintiff was guilty of the crime, they were actionable.

As to the first set of words in the second paragraph of the complaint, we think they are actionable, with the aid of the extrinsic facts alleged. The counsel of appellant argue this point as if the nodding of the head alleged was averred to

have been in the direction of the plaintiff's; but we think, taking the whole paragraph together, and considering that the plaintiff is not shown to have been present or even in view, that we should understand the allegation to be that the defendant nodded his head in the direction of plaintiff's residence, which it is alleged was near at hand, in sight, across the field. The second set of words in this paragraph is clearly sufficient.

With some hesitation we have come to the conclusion that the first, second, and third sets of words in the third paragraph of the complaint cannot be sustained. It is alleged in that paragraph, as will be seen by recurring to it, that in that neighborhood the plaintiff was known by all the community as "Walnuts," and as "the man who deals in walnuts." Now, if it had been alleged that the persons to whom the defendant spoke the slanderous words knew the plaintiff by these names, or that they lived in the neighborhood where he was thus generally known by that name, the hearers would have understood the reference. But the persons to whom the defendant addressed the words complained of are not alleged to have known him by these names, nor is it alleged that the hearers were of that neighborhood; but it is alleged only that they were "divers good and worthy persons of the county."

Had there been, in the conclusion of this paragraph, an unequivocal allegation that the persons to whom the words were spoken understood them to relate to the plaintiff, and to charge him with larceny, we could probably have held these sets of words good. *Harvey v. Coffin*, 5 Blackf. 566; *Harper v. Delp*, 3 Ind. 225.

The fourth set of words in this paragraph is sufficient.

It is objected to the fifth set, that they profess to set out only the "substance" of the words. If the case of *Butler v. Gutheny*, 1 Blackf. 496, is authority, then this set of words is sufficient, for that case decides that such a mode of pleading is allowable. It is urged, however, that that case is not good law, and that for this reason it is not found in

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the first edition of the reports by Judge BLACKFORD. As this case will have to be reversed on other grounds, and as this part of the complaint may be amended in the circuit court, before another trial, we have concluded not to consider or decide this question.

It is contended that the court erred in allowing the plaintiff to testify on the trial that he and the defendant had a difficulty previous to the speaking of the words for which the action was brought. This evidence, we presume, was offered and admitted for the purpose of proving the truth of the allegation to that effect in the second paragraph of the complaint. For that purpose we see no objection to its admission. So far as it went it tended to show that the plaintiff was the person intended by those words of the defendant, which pointed the slanderous charge at some person with whom he was not "good friends."

The plaintiff, on the trial, asked one of the witnesses what impression was made upon his mind by the words spoken by the defendant, as to who stole the wheat, if any. To this question the defendant objected, because the witness had no right to state his impression as to the person meant from the speaking of said words, or any words, and because the question assumed the words testified to meant the charge of larceny. The objection was overruled, and the witness answered that his impression was, just at the time, that Tom McCall, plaintiff, had stolen the wheat. If it was intended by the objection to oppose the statement of a mere impression, because it was merely an impression, then we think the objection was well taken; for though a witness may state a fact to the best of his recollection or belief, or as he thinks the fact to be, *Stucker v. Davis*, 8 Blackf. 414, his mere impressions, not amounting to knowledge or belief, ought not to be received. But if it was intended by the objection to make the point that the witness could not testify as to his opinion, understanding, or belief as to the person to whom the conversation related, then we think it was admissible. *Smawley v. Stark*, 9 Ind. 386. This point is

made with reference to the testimony of another witness who testified as to what understanding he had from the language and motions of the defendant, as to the person he meant. We think the evidence was properly admitted.

Counsel for the appellee contend that the judgment cannot be reversed for a defect in the complaint; that such defect must be regarded by us as having been cured or aided by the answer and verdict. We are aware that there are defects in pleading which may be thus cured, and the pleading aided by verdict. But we do not think that there is any rule by which the objection which we have found to exist to the complaint in this case can, under the circumstances of the case, be regarded as helped by the answer or verdict. If it appeared to us that the evidence was confined to the unobjectionable parts of the pleadings, and did not extend to the defective parts, so that we could see that the judgment was not based on the defective parts of the complaint, as intimated in *Tomlinson v. Hamilton*, 27 Ind. 139, we would then be justified in affirming the same, notwithstanding the defect in the pleadings. But such is not the case. The evidence is not all in the record, and we cannot therefore say that the plaintiff did not recover on the defective parts of the pleadings. The court having committed an error against the appellant, unless we can see that he was not prejudiced thereby, the judgment must be reversed. The defendant did all that was required of him to save the question, and when we, as a court of errors, review the action of the circuit court, we must decide the question as we think that court should have decided it.

The judgment is reversed, with costs.*

W. March and *W. Brotherton*, for appellant.

T. J. Sample, for appellee.

*Petition for a rehearing overruled.

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BRUNT v. THE STATE, on the Relation of FRENCH and Others.

PRACTICE.—*Transcript.*—*Seal of Court.*—A paper purporting to be a transcript of a record, without the seal of the court, cannot be regarded as such in the Supreme Court.

APPEAL from the Madison Common Pleas.

PETTIT, J.—The paper purporting to be a transcript in this case is not certified under the seal of the court from which it purports to come, and for that reason the appeal is dismissed. We cannot recognize a paper as a copy or transcript of the records of another court, unless it comes to us under the seal of that court. 2 G. & H. 273, sec. 558; *Hinton v. Brown*, 1 Blackf. 429; *Vanliew v. The State*, 10 Ind. 384; *Sanford v. Sinton*, 34 Ind. 539.

The appeal is dismissed, at the costs of the appellant.

J. A. Harrison, for appellant.

C. D. Thompson and J. T. Smith, for appellees.

36b	330
145	96
36b	330
145	106
36b	330
154	48

THE CITY OF COLUMBUS v. DAHN.

STREET.—*Dedication.*—*Evidence.*—*Intention.*—The question whether a person intended to make a dedication of ground to the public for a street or other purpose, must be determined from his acts and statements explanatory thereof, in connection with all the circumstances surrounding and throwing light upon the subject, and not from what he may subsequently testify as to his real intent in relation to the matter.

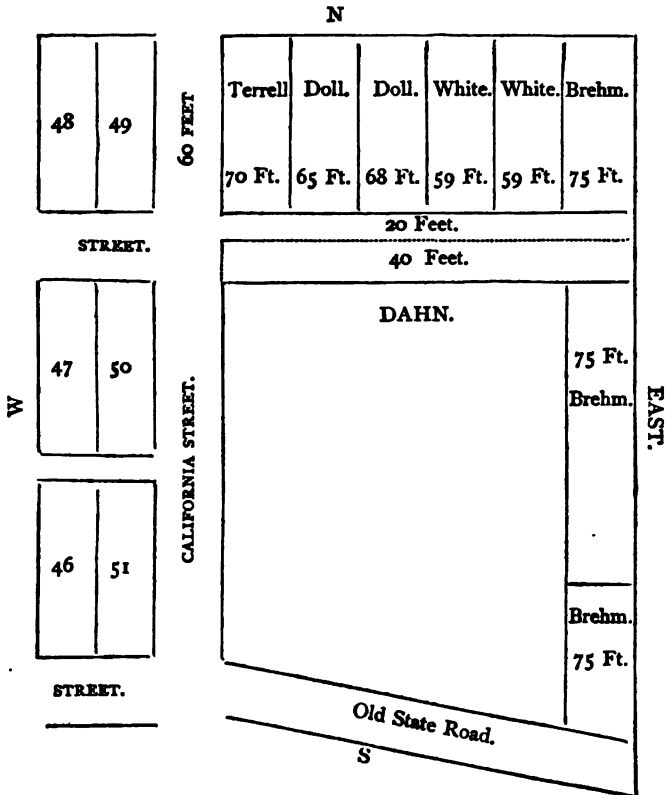
APPEAL from the Bartholomew Common Pleas.

WORDEN, C. J.—This was an action by the city against the appellee commenced before the mayor, to recover a penalty for the violation of a city ordinance, by fencing up and thereby obstructing a street in said city. On appeal to the common pleas there was a trial by jury, which resulted in a verdict and judgment for the defendant. The questions sought to be raised in the case are preserved by the record.

The case seems to have been made out clearly enough, if the ground fenced up was a street. This was the disputed

point. The supposed street was never laid out by any public authority, and it became such, if at all, by dedication. The facts are about these, as near as we can gather them from the evidence. The land claimed as a street, and that on each side thereof, has never been laid off and platted, but it was in 1868 properly taken into the city.

In 1850, Irwin and Jones laid out an addition to the then town of Columbus, the eastern boundary of which was California street, and a street ran east and west through said addition, called Walnut street. The land in dispute here lies east of the said addition. The following diagram of a part of Irwin and Jones' addition, and of the land in controversy, will serve the purpose of explanation.



The dotted line on the diagram shows the fence in question. All west of California street belongs to Irwin and Jones' addition. The street, a portion of which is seen between lots 48, 49, and 47, 50, is Walnut street. The land east of California street belonged originally to Irwin, or Irwin and Jones. This ground, as before observed, was never laid out into lots and platted; but in the years from 1853 to 1857 inclusive, Irwin, and Irwin and Jones made conveyances of the property marked in the diagram "Terrell," "Doll," "White," and "Brehm," so describing it as to leave room for the extension of Walnut street through to the east side of the ground. One of the deeds from Irwin, describing the long strip lying east of the piece marked on the diagram "Dahn," described it as lying between Walnut and Tipton streets, in the town of Columbus, when they may be extended. It may be remarked that Tipton street, if extended, would occupy the place marked on the diagram as "old State road." In 1859 Irwin conveyed the piece marked on the plat "Dahn" to the appellee, describing it as extending "north to the south side of Walnut street when extended," etc. The deeds for the ground, north of the supposed extension east of Walnut street, describe the several parcels as commencing at points at given distances east of the south-east corner of lot number 49 (shown in the diagram) of Irwin and Jones' addition, and described parcels lying north of the starting points. These several starting points, it will be seen, are all on a line with the north side of Walnut street extended. The evidence shows that the space claimed to be an extension of Walnut street was not originally closed up, but that the ground on each side thereof was fenced up to the north and south sides thereof respectively, and that for several years, and up to 1862, the whole width of the street, 60 feet, was used by the public as a street. In 1855, Irwin and Jones conveyed to Francis Pfeifer 286 feet east and west, of the land lying north of the extension of Walnut street, and he testifies that he would not trade until he had some assurance about the street. He bought from

Irwin. Irwin told him there was a street clear through to Doup's land (land lying east of that in controversy); he referred to the street running out from Walnut street; this was on the ground when the parties were trading; the trade was then closed. There seems to have been no controversy about the street until 1862, when Brehm and Dahn quarrelled. Brehm got a conveyance from Irwin of the ground constituting the east end of the extension of Walnut street, that is, the part east of Dahn's land, and fenced it up. This prevented Dahn from getting to land owned by him, lying east, the same land, it is supposed, as was before referred to as Doup's land. Dahn then procured a conveyance from Irwin of the residue of the space which had been used as the extension of Walnut street, and fenced it up. This seems to have shut Brehm pretty effectually in. Afterward the fence was set where it appears by the dotted line in the diagram, enclosing forty feet of the supposed street, and leaving twenty only open to the public.

Prior to 1862 there were several houses built upon the lots or parcels of land north of the supposed street, and one on the piece on the south side. There was also a cooper shop and a tannery. The street in question was the only means of getting to or from these houses and buildings. It was used a good deal by the public until it was fenced up in 1862, with the knowledge of Irwin.

There was but little, if any, evidence that varied the above statement of the case. The case made shows, presumptively, if not conclusively, that the ground in question was dedicated to the public as a street.

Irwin, however, was introduced as a witness, and testifies that he does not remember, nor does he think that he told Pfeifer that there was a street clear through to Doup's land, but if he did he meant it.

The defendant offered to prove by Irwin that he, Irwin, did not intend to dedicate said strip as a street, to which the plaintiff objected on the ground that his intention could only be proved by his acts and declarations therewith; but the

The City of Columbus v. Dahn.

objection was overruled, and the plaintiff excepted. Irwin thereupon testified that he never intended to dedicate this strip as a street, but he thought it might be a street, if the town should be extended. The admission of this testimony was made one of the grounds of a motion for a new trial.

Was the admission of Irwin's testimony, that he never intended to dedicate the ground as a street, erroneous?

In *Zimmerman v. Marchland*, 23 Ind. 474, a question arose whether a deed, absolute on its face, was intended as a mortgage. The court below had refused to permit the grantee to testify that it was his intention and understanding, during the transaction, that he was buying the land, and not loaning money. The court say upon this point: "There was no error in this. It is very true that the intention of the parties is the very question in dispute. But it has always been the law, that that intention could be shown only by the circumstances which occurred, and from which it might be inferred. This was a rule resulting from necessity, it is true, when the parties were not competent witnesses. But it was, nevertheless, a well settled rule. Ought it to be changed, now that the parties are permitted to swear? We think not. But it is enough that it has not been changed."

In New York it is held to be "well settled, under the rule admitting parties to testify in their own behalf, that, where the character of the transaction depends upon the intent of the party, it is competent, when that party is a witness, to inquire of him what his intention was." *Thurston v. Cornell*, 38 N. Y. 281.

The earliest case in New York, bearing upon this question seems to be that of *Seymour v. Wilson*, 14 N. Y. 567. There, one Durkee had made an assignment of property, which was claimed to be fraudulent as against his creditors. On trial before a referee he was asked whether in making the assignment he intended to defraud any of his creditors. The question was objected to on the ground that the witness had no right to swear to his intention; but he must state facts only, leaving the referee to pass upon the question of

intention. The referee excluded the testimony. It was held by a divided court that the testimony was competent. WRIGHT, J. was not present, and JJ. COMSTOCK and MITCHELL were of opinion that the ruling of the referee on the point stated was right.

It is possible that the decisions in New York cannot be easily reconciled. The following cases seem to be somewhat at variance with those above cited. In *The People v. Saxton*, 22 N. Y. 309, a voter had deposited a ballot for the office of county clerk, with a name printed thereon, and another written thereon, and the question was, which one was entitled to the vote. The court below charged the jury that it was competent for them to find from the evidence whether all or any of the ballots were intended for the defendant, and if such was the intention of the voter or voters, to give effect to such intention by allowing the same to the defendant. The court say: "The intention of the voter is to be inferred, not from evidence given by him of the mental purpose with which he deposited his ballot, or his notions of the legal effect of what it contained or omitted, but by a reasonable construction of his acts. His writing a name upon a ballot in connection with the title of an office, is such a designation of the name for that office as to satisfy the statute, although he omits to strike out a name printed upon it in connection with the same office. The writing is to prevail as the highest evidence of his intention."

Again, in *Shaw v. Stine*, 8 Bosw. 157, the suit was to recover damages from the defendants, for inducing the plaintiffs, by false and fraudulent representations, to sell and deliver goods to a third person. The plaintiff, Shaw, was asked this question. "Did you or not sell and deliver the goods on the faith of the representations and statements of the defendant Mendel, respecting the pecuniary condition and responsibility of Cohen and Mendel?" On objection being made, the evidence was rejected. The court say: "Respecting the question proposed to the plaintiff, Shaw, when testifying, and which was objected to, we think the court de-

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cided correctly in excluding it. The question required the witness to declare to the jury what the private operations of his mind were at the time of the sale. It is true that the discovery of these, to a certain extent, is necessarily involved in the investigation and decision of the issues presented in the case; but the knowledge of them must be gathered, not from allegations which the witness may now make as to what his mental emotions or purposes then were, but from the attending circumstances of the occasion; from the acts and declarations of the parties at the time." Reference is made to the case of *The People v. Saxton*, *supra*, as sustaining this view.

We do not see as the statute rendering parties competent as witnesses has much, if any thing, to do with the question. It is a question of the competency of evidence, whether coming from a witness who is a party or otherwise. The statute has not made that competent, which before would have been incompetent, as matter of evidence, though coming from a competent witness. Both before and since the statute, cases have frequently depended upon the intent with which certain acts were done by persons not parties, and who were competent witnesses. This case is an illustration of them. To be sure, if the evidence is in itself competent, and the question involves the intent with which an act has been done by a party to an action, the statute makes the evidence admissible because it makes the party competent to testify, who was incompetent before. In other words, the statute has simply made a party competent to testify to whatever would be competent as coming from any other witness, and nothing more.

We have come to the conclusion that the testimony of Irwin, that he never intended to dedicate the strip of ground as a street, was incompetent and should not have been given. In deciding this, we do not decide that in no case can a witness, whether he be a party or otherwise, testify as to the intent with which he did, or omitted, any given act. When other cases arise there will be time for their decision.

"It is a general rule that to constitute a valid common law dedication, there must be an intention to dedicate, and an act on the part of the owner, and an acceptance on the part of the public. This general rule is, however, subject to modification, that if the owner of a servient estate intentionally or by gross negligence leads the public to believe that he has dedicated the premises to public use, he will be estopped from denying the dedication to the prejudice of those whom he may have mislead." Herman on Estop. sec. 521; *Wilder v. The City of St. Paul*, 12 Minn. 192, and authorities there cited.

We think that the question, whether a person intends to make a dedication of ground to the public for a street or other purpose, must be determined from his acts and statements explanatory thereof, in connection with all the circumstances that surround and throw light upon the subject, and not from what he may subsequently testify as to his real intent in relation to the matter. And this is on the principle that the public have the right to suppose that a man intends what his outward conduct and statements indicate, inasmuch as they cannot discover his intention in any other manner. Men, in all the affairs of life, are presumed to intend what is fairly and clearly indicated by their acts and conduct; and where the rights of the public or third parties are concerned, they have a right to act upon such presumption.

For the error in the admission of the evidence, the judgment below must be reversed.

The judgment is reversed, with costs, and the cause remanded for a new trial.

N. T. Carr and *F. Winter*, for appellant.

S. Stansifer, for appellee.

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THE FIRST PRESBYTERIAN CHURCH OF FORT WAYNE v. THE
CITY OF FORT WAYNE and Others.

CITY.—Church Property.—Assessments for Construction of Sewers.—Exemption.—A building and the ground upon which the same is situated, used for religious purposes, are not liable to assessment to contribute to the cost of the construction of sewers in a city. Such property not being valued and assessed upon the tax duplicate for state and county or city taxes, no method is provided by law for its assessment for the purpose of sewerage.

APPEAL from the Allen Common Pleas.

BUSKIRK, J.—This was a proceeding by the appellant to enjoin the appellees from collecting an assessment that had been made upon the property of the appellant to pay for the construction of a sewer in the said city. There is no objection to the regularity of the proceedings of the Common Council, in ordering the work to be done, or as to the manner in which it had been done. The complaint alleges that the appellant owned lots 113 and 114 in said city; that they were ordinary sized lots, not containing over a third of an acre; that there is erected on the said lots a building for religious worship, known in common parlance as the Old School Presbyterian Church, and sometimes as the First Presbyterian Church; that the said building had been erected and used for such purpose for twenty years last past, and is still used for such purpose; that the said lots have not, since they were thus used for religious purposes, to wit, for the last twenty years, been placed upon the county or city duplicates for taxation, and have not, during such time, been assessed with such county or city taxes, nor have they been appraised or valued for such taxation; and the plaintiff avers that, for the reason aforesaid, the said lots are not subject to assessment by the city for the purposes of the construction of sewers, and that the assessment thus made is illegal and in violation of the rights of the plaintiff herein. It further appears from the complaint, that the civil engineer of said city returned to the common council an estimate of the costs of the con-

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struction of the said sewer, in which estimate there was assessed in favor of the said contractors, against the plaintiff, the sum of four hundred and nine dollars and twenty cents, as the owner of the said lots, and that such proceedings had been had, that a precept had been issued to the treasurer of the said city, commanding him to make said sum of money and the costs by the sale of the said premises, and that he would do so, unless restrained. The appellees demurred to the complaint, which was sustained, and the appellant excepted, and refusing to amend, the court rendered final judgment for the appellees, and the appellant appealed to this court.

The only error assigned is, for sustaining the demurrer to the complaint. Did the court err in sustaining such demurrer?

There is no doubt that, under our constitution, the premises described in the complaint were exempt from state and county taxation. Sec. 1 of article 10, 1 G. & H. 50; sec. 6 of Assessment Laws, 1 G. & H. 69; *The Common Council, etc., v. McLean*, 8 Ind. 328; *Orr v. Baker*, 4 Ind. 86.

There is just as little doubt that a tax, as contemplated by the constitution and statute referred to, is entirely separate and distinct from an assessment for local purposes, and hence such an assessment does not come within the exemption. This question has been ably discussed by this court in the case of *Palmer v. Stumph*, 29 Ind. 329. To the same point are other decisions in other states having constitutional and statutory provisions like ours. *The Northern Indiana Railroad Company v. Connelly*, 10 Ohio St. 159; *The Northern Liberties v. St. John's Church*, 13 Penn. 104; *The State v. Robertson*, 4 Zab. 504; *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586; *Bleecker v. Ballou*, 3 Wend. 263. From these authorities it is established that an assessment is not a tax, such as will entitle the appellant to exemption under our constitution and statutes.

The authorities above cited also show that the several states have uniformly held that church property can be

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assessed for street improvements by municipal corporations. A leading case is that of, In the matter of the application of the mayor, aldermen, and commonalty of the city of New York, for the enlarging and improving a part of Nassau street, in the said city, 11 Johns. 77.

This decision of the New York court, under a state constitution similar to ours in reference to the exemption of church property from taxation, has been followed and approved by many other states with similar constitutional exemptions.

The real and substantial question involved in this case is, whether, the property of the appellants not having been appraised and assessed for the purpose of state, county, and city taxation, there is any mode provided by the statute, by which the value of the property can be ascertained, and the expense properly chargeable against the said property for the construction of such sewer can be fixed and determined.

The forty-third clause of section 53, 3 Ind.Stat. 88, of the act providing for the incorporation of cities, reads as follows:

"Forty-third. To construct and regulate sewers, drains, and cisterns, and provide for the payment of the cost of constructing the same; to cause the same to be done by contracts, given to the best bidder, after advertising to receive proposals therefor; to provide for the estimate of the cost thereof, and the assessment of the same upon the owners of such lots and lands as may be benefited thereby, in such equitable proportion as the common council may deem just, which estimate shall be a lien upon such lots and lands, and may be enforced by sale of the same, in such manner as the common council may provide; provided, however, that not (to) exceed ten per cent. of the value of such lot or lands, as the same is valued and assessed upon the tax duplicate for state, and county, or city taxes, shall be assessed against such lot or lands, in any one year."

It is earnestly maintained by the appellant, that inasmuch as the premises owned and used by it have never been appraised, valued, assessed, or placed on the duplicate for

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state, county, or city taxes, the value of the said premises cannot be ascertained in that mode, and that the legislature having failed to provide any other mode by which its value could be ascertained, the estimate made by the city civil engineer was illegal and void.

Two briefs have been filed by the appellees. The one by the counsel for the city, and the other on behalf of the contractors. The positions assumed by the counsel for the appellees are not entirely harmonious and consistent with each other.

The counsel for the city assumes the following position, namely: "Taxes are public burthens imposed, as burthens, for the purpose of a general revenue; assessments are made with reference to the special benefit which such property derives from the expenditure." See *Palmer v. Stumph*, 29 Ind. 329; *The Northern Indiana Railroad Company v. Connelly*, 10 Ohio St. 159. There has been no decision in this State, as yet, upon the effect of the proviso relied on by appellant, but there has been a decision made by the Supreme Court of Ohio, which, we think, is of high authority upon the subject, because based upon a similar statute. The statute will be found on page 1546 of Swan and Critch. Stat. We will quote a part of this statute, which is as follows:

"After speaking of the mode of making these street improvements, the statute continues: that the 'common council may, by ordinance, levy and assess a tax, to defray all the expenses consequent upon such improvements, on the owner, or owners of the lots or lands, or on the lots or lands by or through which such street, alley, or public highway shall pass, according to the true intent and meaning of this section, either by the foot front of the lots or lands bounding and abutting thereon, or according to the value of such lots or lands, as assessed for taxation under the general laws of the State, as the city council may, in each case, determine.' Then follows a proviso, similar to that relied upon by the appellant, which is in words, as follows: 'provided, that in no case, shall the tax levied and assessed upon any lots or lands, for any im-

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provement, authorized by this section, amount to more than fifty per cent. of the value of said lots or lands, to be estimated after the said improvement has been made, and all the cost of the said improvement, exceeding said per centum, that would otherwise be chargeable on said lots or lands, shall be paid by the municipal corporation out of its general revenues.' If the position of the appellant be correct upon the proviso in clause 43 of sec. 53 of our city charter, then, by the same argument, the cities of Ohio, under their charter, might assess all lots or lands, for street improvements, if abutting on the street, by the foot front, but if they should adopt the other mode, viz.: 'according to the value of such lots or lands as are assessed for taxation under the general laws of the State,' then they could not assess 'all lots or lands,' but only such as might be valued and assessed for state, county, or city taxation."

The Northern Indiana Railroad Company v. Connelly, 10 Ohio St. 159, and *Creighton v. Scott*, 14 Ohio St. 440, are referred to as containing a construction of the Ohio statute above quoted, and that such decisions are applicable to the case under consideration. It is provided in the Ohio statute that the "common council may, by ordinance, levy and assess a tax to defray all the expenses consequent upon such improvements, on the owner, or owners of the lots or lands, or on the lots or lands by or through which such street, alley, or public highway shall pass, according to the true intent and meaning of this section, either by the foot front of the lots or lands abutting and bounding thereon, or according to the value of such lots or lands, as assessed for taxation under the general laws of the State, as the city council may in each case determine."

By the above statute two modes were provided for levying the tax, and the city council had the right to adopt either mode.

The supreme court of Ohio, in *The Northern Indiana Railroad Co. v. Connelly*, *supra*, say: "The law, purposely, leaves the city authorities free to adopt whichever mode they, under the circumstances, may deem most equitable."

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In *Creighton v. Scott*, *supra*, the court say: "The power is here given the corporation of electing which of the two modes of assessment it will adopt; but when this election is made, the discretion ends, and the law prescribes the rule of uniformity for the imposition of the charge, as well as the extent of its operation."

The forty-third clause of section 53 of our city charter does not give any discretion to the common council. There is but one mode provided. It was held in the above cases that when the election was made, the mode pointed out by the law had to be pursued. Either the one mode or the other had to be pursued. When a power is conferred upon a court of inferior and limited jurisdiction, or upon the municipal authorities of a city, and the manner in which the power is to be exercised is pointed out and prescribed, that mode must be pursued; for such courts or the common council of a city can exercise no power that is not directly, or by necessary implication, conferred. When the legislature says that a thing shall be done in a particular manner, it cannot be done in a different manner, and this is especially so, where there are negative words, that in effect prohibit the doing of the thing, unless it is done in the manner prescribed, as there are in the proviso. *English v. Smock*, 34 Ind. 115.

But it is maintained that authority is conferred, in the body of the clause under consideration, upon the common council to provide for the estimate of the cost thereof, and the assessment of same upon the owners of such lots and lands as may be benefited thereby, in such equitable proportion as the common council may deem just. We are inclined to think that the above clause has reference to the benefits; but suppose it confers full authority on the common council to make estimates, is not the power thus conferred taken away, unless it is done in the manner pointed out in the proviso?

In *Voorhees v. Bank of United States*, 10 Pet. 449, it was held, that "a proviso in deeds or laws is a limitation or exception to a grant made or authority conferred; the effect of which is to declare that the one shall not operate, or the

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other be exercised, unless in the case provided." See *Wayman v. Southard*, 10 Wheat. 1.

Sedgwick says, "A curious rule of a very arbitrary nature, to which I have already alluded, prevails with regard to provisos. It is, that when the proviso of an act of Parliament is directly repugnant to the main body of it, the proviso shall stand, and be held a repeal of the provision, as it speaks the last intention of the makers." *Attorney General v. Chelsea Water Works Company*, Fitzg. 195; 2 Darris on Stat. 515; *Rex v. Justices of Middlesex*, 2 B. & Ad. 190.

The mode of making assessments upon property for street improvements is quite different from that provided in the case of sewers. It is provided in section 68, 3 Ind. Stat. 98, as follows:

"And the common council are hereby invested with full powers to pass by-laws and ordinances providing how and in what manner the repairs shall be made, and in what manner the same shall be assessed and collected from such owner or owners, and the manner in which the lien of the city for the expense incurred by her may be enforced against the lot or lots of such owner or owners." Section 70 of said act confers on the common council the power to cause estimates to be made from time to time of the amount of work done by the contractor, and to require such amount to be paid to him, etc.

By the above sections full and ample discretion is conferred on the council in reference to street improvements. The counsel for the contractors, in their brief, assume the following positions:

"We insist that the proviso has no such effect as is claimed for it, and that it can only have effect given to it by applying it only to the cases for which it was intended, and by holding that the legislature did not intend to give the benefit of the ten per cent. clause to wealthy corporations but only to individual property owners, who might be seriously inconvenienced by a burdensome assessment for the improvement.

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"We think the true construction of the clause with the proviso must be, that the proviso does not abrogate the power to assess church property, conferred by the enactment preceding it, but that, being remedial, and for the benefit of property owners simply, it does not apply or take effect in a case where the property benefited is not on the tax duplicate at all, and consequently that the owners of property, not on the duplicate, cannot claim any benefit under the proviso, but must become at once liable for the whole amount of the assessment."

We do not think that the above construction is correct. We cannot bring our minds to the conclusion that the legislature intended to impose upon churches and educational institutions harder conditions than were imposed upon the private citizen, whether rich or poor. It would create unjust discriminations. It would be quite as reasonable to presume that the legislature did not intend to assess any property that was not on the tax duplicate for state, county, and city purposes. We do not think that either of the above constructions is correct. The more reasonable presumption is, that it never occurred to the draftsmen of the above section, that there was any property that was not on the tax duplicate. In our judgment, it was an accidental omission. The value of the premises in controversy not being on the tax duplicate, and they having never been valued and assessed for state, county, or city taxes, the estimates for the work done cannot be made on such valuation, and there being no other mode provided for ascertaining the value of such property, the estimates made by the city civil engineer were made without authority of law, and are consequently illegal and void.

We have reached this conclusion after a very careful and mature consideration, and with much reluctance. But it is our duty to construe the law as made by the legislature. We possess no legislative power. The remedy must be provided by the law making power.

The judgment is reversed, with costs, and the cause is

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remanded with directions to the court below to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

WORDEN, C. J., having been concerned as counsel was absent.

J. L. Worden, J. Morris, W. H. Wethers, W. H. Coombs, and W. H. H. Miller, for appellant.

R. S. Robertson and J. Colerick, for appellees.

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36	346
138	328
36	346
145	508

TOWNSHIP TRUSTEE.—*Title to Money in his Hands.*—A township trustee is not a mere bailee of the money that comes into his hands by virtue of his office. He is liable to account for and pay it over, whether the same be stolen or burned without his fault, or loaned out. The legal technical title to the money in his hands is in himself.

PROMISSORY NOTE.—*Defense.*—In an action upon a promissory note, an answer that the money forming the consideration for the note was township and school money, coming into the hands of the plaintiff by virtue of his office as township trustee, and unlawfully loaned by him to the defendants, and that since said loan the plaintiff had vacated his office, constituted no defense to the suit.

APPEAL from the Hancock Common Pleas.

WORDEN, C. J.—This was an action by the appellee against the appellants upon two promissory notes executed by the defendants to the plaintiff. Issue, trial, finding, and judgment for the plaintiff.

The only question properly raised in the case is presented by the ruling of the court in sustaining a demurrer to the second paragraph of the defendants' answer.

That paragraph is as follows: "And for a further answer, the defendants say that the plaintiff ought not to have and maintain his action upon the notes mentioned and set out in the first and second paragraphs of his complaint, because

they say that at the time of the execution of each of said notes by them to the plaintiff, he, the said plaintiff, was the trustee of Jackson township in the county and State aforesaid, and by virtue of his said trust as such was the lawful custodian of the treasure and moneys of said township, and of the school fund apportioned thereto, and was then and there, as such trustee, in possession of large sums of money belonging to said township, consisting in part of the school fund apportioned to the same; and that he, the said plaintiff, unlawfully, and without any right whatever to do so, loaned to the defendants a portion of said moneys belonging to said township and fund, for which they, the said defendants, executed and delivered to him the notes sued on in this action; and that since the execution of said notes, and before the commencement of this action, the plaintiff's term of office, as such trustee, expired, and he ceased to act as such; by reason of all which the defendants say that the plaintiff had no property in the money for which said notes were given, nor has he now, and that said notes are not the evidence of a valid and binding contract, and that the same were given without any valid or legal consideration moving from the plaintiff to the defendants; wherefore they demand judgment."

We are of opinion that the demurrer to this paragraph was correctly sustained. In the case of *The Chester Glass Company v. Dewey*, 16 Mass. 94, it was held that if a corporation set up a store for the sale of merchandise generally, and sell such merchandise on credit, it does not lie in the mouth of a purchaser, in an action for the price of the goods sold to him, to object that they were prohibited by law to carry on such trade. We, however, do not decide the case upon this narrow ground; we may remark, however, that the defense has nothing in it to commend itself to favorable consideration; but, notwithstanding this, it should prevail if the rigid law is with the defendants.

A township trustee is required to take an official oath, "and execute a bond conditioned as in ordinary official

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bonds, with at least two freehold sureties, in a penalty of not less than double the amount of money which may come into his hands at any time during his term by virtue of his office," and his duties are, among other things, second, "to receive all moneys belonging to the township, and pay the same out according to law, as right and justice shall require," and fifth, "to see to a proper application of all moneys belonging to the township for road, school, or other purposes, and perform all the duties heretofore required of the township trustees, clerk, and treasurer, under the supervisors and school acts." 1 G. & H. 637, secs. 5 and 6.

It would seem, under these provisions, that a township trustee, like a county treasurer, is liable on his bond for all money that comes to his hands by virtue of his office, whatever may become of the money. *Halbert v. The State*, 22 Ind. 125. He is not a mere bailee of the money, and therefore held to only reasonable care. He is liable to account for and pay over whatever amount comes to his hands by virtue of his office, whether the same has been stolen, or burned, without his fault, or loaned out to a litigious borrower from whom he is unable to collect.

Under these circumstances, as the trustee is not a mere bailee, it would seem that the legal technical title to the money in his hands is in himself. Suppose a township trustee should die with moneys received by him as such, in his hands; can it be claimed that the money, even if the specific bills or coin received by him officially could be identified, would go to his successor and not to his administrator? We think it quite clear, in the case supposed, that the money would go to the administrator, because simply the title was in the trustee.

This view is fully sustained by authority. In the case of *Inhabitants of Colerain v. Bell*, 9 Met. 499, it was held that "the specific money received by a collector, in the collection of taxes, is his money, and not that of the town."

If we are right in this view, there was not only a valid

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legal consideration for the notes, but there was nothing in the transaction that was illegal.

The judgment below is affirmed, with costs and five per cent. damages.

W. R. Hough, for appellants.

VANNOY and Another v. BLESSING and Others.

SINKING FUND MORTGAGE.—*Sale by Mortgagor after Property was Bid in by the State.*—*Purchase from the State.*—*Adverse Possession.*—*Favored Purchaser.*—*Warrant for Possession.*—*Occupying Claimants.*—Certain real estate was mortgaged to the Sinking Fund of the State of Indiana, in 1854, and on default in the payment of interest and principal, in 1862, was bid in by the State, and A., the mortgagor, subsequently sold the property to B. and executed a deed for the same on the 3d day of June, 1869, he and his assigns remaining in possession of the property to the present time; and on the 5th day of June, 1869, the Auditor of State sold and conveyed the property to C., who gave notice to B. to surrender the premises and, on his failure to do so, procured a warrant from the Auditor of State, directing the sheriff of the county, where the land was situated, to put C. in possession, and B. thereupon applied for an injunction, alleging that he had made valuable improvements on the land and had been in adverse possession of the same when the sale was made by the Auditor.

Held, that the possession of the mortgagor and of his grantee was not adverse.

Held, also, that the right of a grantee from the mortgagor to be favored in the purchase only continued for six months after the land was bid in by the State, and the decision of the Auditor among such applicants to purchase was final.

Held, also, that the warrant issued by the auditor was authorized by law.

Held, also, that the statute on the subject of "occupying claimants" has no application to this case, and the mortgagor or his grantee can claim no benefit from the same.

APPEAL from the Judge of the Shelby Circuit Court.

WORDEN, C. J.—A complaint was filed below in vacation, by the appellees against the appellants, one of the latter, Hoop, being the sheriff of said county. The complaint alleged, in substance, the following facts, viz:

That in the year 1854, Martin M. Ray, who was then the

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owner of the property, mortgaged a certain described part of a lot in the town of Shelbyville, in said county, to the sinking fund of the State of Indiana, for the sum of three hundred dollars, which property was bid in by the State, in the year 1862, for non-payment of principal and interest; the property, however, remaining in the continued and adverse possession of Ray and those claiming under him, from the time of the execution of the mortgage down to the time of the bringing of the action; that on the 3d of June, 1869, the said Ray having previously sold the property to said plaintiffs, Blessing and Sayler, conveyed the same to them; that lasting and valuable improvements have been made upon the property by those claiming under Ray, of the value of fifteen hundred dollars; that on the 5th of June, 1869, the defendant, Vannoy, secretly and clandestinely, and without the knowledge of any of the plaintiffs, and with the intent to cheat and defraud the said mortgagor, and without his knowledge, as the plaintiffs were informed and believed, and in fraud of the rights of said Blessing and Sayler to become the favored purchaser of said property, made a pretended purchase of said property at private sale from the Auditor of State, and obtained a deed for said property, as they are informed and believe, under the provisions of an act of the General Assembly of the State of Indiana, approved January 13th, 1845, but as they have neither the original nor a copy of the deed, they cannot furnish a copy; that on the 10th of June, 1869, the said Vannoy served a notice to quit, on Pierce, who was in possession, as tenant to said Blessing and Sayler, and who joins as plaintiff in virtue of said tenancy, a copy of which notice is filed; that on the 11th of June, 1869, the said Vannoy, with the same fraudulent purpose, obtained a warrant or order, from the Auditor of State, a copy of which is filed, directed to said sheriff, requiring him to remove said Pierce from the premises within ten days.

The object of the action is to enjoin the service of said warrant.

The plaintiffs, Blessing and Sayler, claim:

First, that the deed from the Auditor of State is void as against them, because they purchased the property as aforesaid, and have been since their said purchase, by themselves and tenants, in the actual, continued, and adverse possession of the property, down to the time of bringing the action.

Second, they claim as *bona fide* purchasers for value, under the mortgagor, Martin M. Ray, the right of becoming preferred or favored purchasers of the lot thus bid in by the State and wrongfully sold to Vannoy.

Third, they claim that the warrant from the Auditor of State is unauthorized by law, because Vannoy claims under a deed and not under a certificate of purchase.

The plaintiffs also insist that they cannot be dispossessed, under the occupying claimant law, until their claim for improvements shall have been adjusted.

On this complaint, on the 14th day of June, 1869, a temporary restraining order was granted until the 1st of July, 1869, at which time the parties appeared, and the plaintiffs moved to continue the restraining order until the final hearing; the defendants filed a demurrer to the complaint, which was overruled, and the plaintiffs' motion sustained, the defendants excepting.

We have no brief on behalf of the appellees, and can, therefore, only conjecture the ground on which the injunction or restraining order was granted, or the argument that might be advanced to sustain the same. We proceed to examine the several positions thus assumed in the complaint.

We pass the question, whether the possession of a mortgagor or those claiming under him can, in any case, be deemed to be adverse to the mortgagee or those claiming title by virtue of a sale made under the mortgage, and proceed to inquire whether such possession, assuming it to be adverse, can render such sale as that under consideration void. In the case of *McGill v. Doe*, 9 Ind. 306, it was held that judicial sales were not affected by adverse possession, not being within the policy of the champerty law. In the case above cited, a passage from a note to Kent's Com. is quoted, to the

effect that neither judicial nor official sales are within the policy of the champerty law, and it is added that the court approves and follows the authorities thus quoted. The case of *McGill v. Doe* was followed in the case of *Webb v. Thompson*, 23 Ind. 428, where the court correctly remark that "it is not the inclination of the courts of this country to carry the doctrine of champerty any further than it has already gone."

There is as little reason for applying the doctrine of champerty to sales of the kind under consideration as to judicial sales. Indeed, it would be quite detrimental to the public interests to apply the doctrine to such cases. Of course a sale of land on a mortgage to the sinking fund, for non-payment of the money borrowed, could only vest the purchaser with whatever title the mortgagor had in the premises. Such sale could not affect the title of a third party, not acquired through the mortgagor since the execution of the mortgage, in other words, a title valid in itself and adverse to the mortgagor.

If the State were required first to acquire possession, where the land might be held adversely, before sale could be made, it would greatly embarrass and impede the collection of the fund; and we think such course is not contemplated by the statutes on the subject of that fund.

The first objection made in the complaint to the title of Vannoy is not well taken.

We come to the second point, in which the plaintiffs claim the right of becoming preferred or favored purchasers of the lot.

It is provided by sections three and four, of an act approved January 13th, 1845, Acts 1845, page 19, as follows, viz:

Sec. 3. "After the lapse of six months, any person having a *bona fide* title claiming under such mortgagor, or any *bona fide* junior mortgagor or junior incumbrance, shall have the privilege of becoming a favored purchaser of the whole or any portion of the premises covered by any mortgage foreclosed and bid in by the State as aforesaid, according to

priority of mortgage or other equity; and in case of several applications to purchase, or in case of conflict between applicants in regard to such privilege, the president and commissioners of the sinking fund shall have power to determine the same, whose decision in the premises shall be final."

Sec. 4. "After the expiration of said six months, any and all lands and lots bid in by the State as aforesaid, and which have been once offered at public sale, shall be subject to private sale at the sinking fund office at Indianapolis, on a credit of five years, the interest to be paid annually, in advance, and the land to forfeit and revert to the State, for any default of payment according to the terms of purchase."

The third section above quoted is believed to have been in force at the time of the sale made by the auditor to Vannoy, and is yet in force so far as we are advised, except that the duties, therein directed to be performed by the president and commissioners of the sinking fund, are transferred to the Auditor of State, by the first section of the act approved March 11th, 1867 (3 Ind. Stat. 487).

The fourth section above quoted is so far modified by the eighth section of the act of March 11th, 1867, as that all sales thereafter of lands, forfeited by reason of non-payment of any loan, were required to be made for cash only.

We have set out sections three and four of the act of 1845, as they originally stood, in order the better to ascertain their meaning. We think, taking the two sections together, that where there are conflicting applications to purchase by persons claiming the privilege provided for, the decision between them of the president and commissioners of the sinking fund, and under the later act the decision of the Auditor of State is final; and that after the expiration of six months, and the lands have been offered at public sale, and there is no application from any one claiming the privilege to become such favored purchaser, the lands may be rightfully sold to any person who will buy on the terms prescribed by law.

It appears by the case made in the complaint, that the lot was bid in by the State in 1862, and that it was not sold to Vannoy until 1869, making a period of about seven years. It does not appear that the plaintiffs, or any one under whom they claim, at any time, ever made any application whatever to become the purchasers of the lot, whether as favored or otherwise; nor does it appear that the lot had not been offered at public sale; nor indeed is any reason shown why the sale by the auditor was not in strict accordance with the law.

There is no foundation for the second point made by the plaintiffs.

We now consider the third. This is, that the warrant is unauthorized, because Vannoy claims under a deed and not under a certificate of purchase.

The eighth and ninth sections of the act of 1845, provide for the removal of the occupant of land forfeited to the State for failure to pay, and also where the land has been sold and the purchaser holds a certificate of purchase, by means of a warrant from the auditor; but this act has nothing to do with the question under consideration. We have already seen that by the act of March 11th, 1867, all sales of forfeited lands, thereafter to be made, were to be made for cash only; and by the first section of the same act, the Auditor of State is authorized to make deeds of lands sold by the commissioners of the sinking fund, or thereafter to be sold by him.

The ninth section of the act of May 4th, 1852, (1 G. & H. 420) provides for the removal of the occupant of land, where the principal or interest due on land mortgaged shall be unpaid, by means of a warrant from the Auditor of State, directed to the sheriff of the county in which the lands lie; and the twelfth section of the same act provides that the purchaser of lands sold by the State for failure to pay principal or interest shall have the same remedy. Thus it is seen that the warrant was duly authorized by law.

The last point made is in relation to the claim of the plaintiffs for improvements.

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The statute on the subject of "occupying claimants" (2 G. & H. 285) can have no application whatever to cases like the present. Its terms utterly exclude such application. In the first place, it is only where the party making the improvements has been found, "in a proper action," not to be the owner of the property, that the remedy provided for can be applied; secondly, under this statute, the plaintiff in the main action may pay the value of the improvements, deducting the rents, profits, and damages, and take the property; or in default of such payment, the defendant may keep the property upon paying the value of the land, aside from the improvements. No machinery is provided for carrying out these provisions in a case where the purchaser from the State of lands mortgaged to the sinking fund is put in possession by means of a warrant from the auditor; thirdly, neither the mortgagor nor those claiming under him, with actual or constructive notice of the mortgage, can claim the benefit of improvements made by them as against a party having a title by virtue of a sale under the mortgage.

We see no valid objection to the title of Vannoy, nor any reason why the warrant from the Auditor of the State should not be executed, and are of opinion that the judge below erred in granting the restraining order on the case made by the complaint.

The order of the judge granting the restraining order is reversed, with costs, and the cause remanded.

J. Gavin and J. D. Miller, for appellants.

MEIKEL v. THE STATE SAVINGS INSTITUTION OF CHICAGO.

PROMISSORY NOTE.—Alteration.—Burden of Proof.—In an action on a note negotiable by the law merchant, where the defendant alleges an alteration of the note after he had signed it, if there be no indication of such alteration

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appearing on the face of the note, the burden of this issue is upon the defendant.

APPEAL from the Marion Common Pleas.

WORDEN, C. J.—This was an action by the appellee, as the holder, against the appellant, as the maker of the following promissory note:

“\$583.33.

INDIANAPOLIS, July 13th, 1866.

Six months after date, I promise to pay to the order of William Wallace, five hundred and eighty-three dollars and thirty-three cents, at the First National Bank of Indianapolis; value received, without any relief from valuation or appraisal laws.

(Signed)

JOHN M. MEIKEL.”

There was an answer of eight paragraphs filed, but as no question arises upon any of them except the eighth, none other than that need be noticed. That paragraph is as follows:

“For a further answer to said complaint the defendant, Meikel, says that he did not execute the note sued upon in the form in which the same is declared upon and copied in the complaint; that since he signed and delivered said note to the payee, William Wallace, the same has been altered by inserting, where they now appear in said note, these words, viz: ‘at the First National Bank of Indianapolis.’ Wherefore, etc.” Verification. Replication in denial.

The cause was submitted to the court for trial, and the court, having found for the plaintiff generally, was requested to make a special finding, in order that exception might be taken to the conclusions of law upon the facts found, and the court thereupon made the following special findings and conclusion of law thereon:

“The court finds, as a question of law, that the burden of proof is upon the defendant to show that the note sued on was altered by inserting the words, ‘First National Bank of Indianapolis,’ after the note was signed by the defendant, Meikel, there being no indication of alteration appearing on the face of the note.

"Secondly, the court finds, as a question of fact, that there is no preponderance of evidence showing that the note was altered by inserting the words 'First National Bank,' etc.

"Thirdly, the evidence does not show that the plaintiff had any knowledge of any fraud in the consideration of the note."

The third finding has reference to questions arising under the other paragraphs of the answer, and need not be further noticed.

The first finding seems to be compounded of law and fact, viz: reversing the order of the finding, it finds that there was "no indication of alteration appearing on the face of the note," and as a legal conclusion, it is found that in such case the burden of proof is on the defendant to show the alteration. This finding was excepted to by the defendant, and it presents the only question arising in the record, except that arising on the overruling of a motion for a new trial on account of the insufficiency of the evidence to sustain the finding.

We are of opinion that there was no error in the conclusion of law above stated, of which the appellant can complain. The burden of the issue formed on the paragraph of the answer, above set out, was on the defendant, because the paragraph was affirmative in its character, and admitted everything that the plaintiff would have been bound to prove in order to recover. It admitted the signing and delivery of the note, but alleged a subsequent alteration. The signing and delivery of the note, the facts admitted, entitled the plaintiff to recover, unless some evidence was given of the alleged alteration. Suppose instead of the special answer thus filed, the defendant had pleaded the general denial under oath; it is clear that although under it he might have shown the alteration, yet the plaintiff would only have been required to prove the genuineness of the defendant's signature and the delivery of the instrument (which latter might be inferred from the plaintiff's possession), in order to entitle him to recover, in the absence of any evidence of the alleged

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alteration. Under the pleading here, if neither party had offered any evidence, the plaintiff would have been entitled to recover; hence, the burden of the issue was on the defendant.

It is laid down by Mr. Greenleaf, that "if, on the production of the instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance." 1 Greenleaf Ev., section 564. We shall not enter upon any discussion as to the correctness of this rule, or examine the various and conflicting authorities upon the subject.

The court found that the note in question did not furnish a case for the application of the rule; in other words, the court found, as a matter of fact, that there was "no indication of alteration appearing on the face of the note."

Where such is the case, the burden of proving the alteration lies upon the defendant, even as respects commercial paper. *Davis v. Jenney* 1 Met. 221.

Admitting, for the purposes of this case, that the rule above quoted from Greenleaf is right, still the conclusion of the court upon the point of law was right. The court was trying the facts in the case instead of a jury, and as such found that there was "no indication of alteration appearing on the face of the note," and concluded, as matter of law, that in such case the burden of proof of the alteration lay upon the defendant. Whether or not the note appeared to have been altered, could only be determined by inspection; and such inspection might be made by the court or jury trying the cause, and constitute a part of the evidence in the cause. Now, had the cause been tried by a jury, and the note given in evidence, the court might very properly have said to the jury, "the note is before you, and you are at liberty to inspect it, and if you find on inspection that 'no indication of alteration appears on the face of the note,' the burden of proving the alleged alteration lies upon the defendant." And if the law requires the holder of a note appearing to have been altered to explain it, the court might have given the converse of the proposition and said to the jury that if the note

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appeared to have been altered, the burden of explaining the alteration lay upon the plaintiff. All this is perfectly consistent with the proposition, that the burden of the issue lay upon the defendant. Whether or not the note appeared to have been altered, was simply a matter of evidence; and if on the trial the note appeared to be altered, and if that called upon the plaintiff to explain, the case was made out for the defendant *prima facie*, and the burden would then be shifted on to the plaintiff. This making out a *prima facie* case by the evidence, and thus casting the burden of meeting it on the other side, occurs in every day practice.

There being no preponderance of evidence showing that the note was altered, it follows that the general finding for the plaintiff was right.

The evidence, we think, fairly sustains the finding.

The judgment below is affirmed, with costs, and five per cent. damages.

M. M. Ray, J. W. Gordon, W. March, W. R. Manlove, and Troxell, for appellant.

J. Hanna and F. Knefler, for appellee.

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ASSIGNMENT OF ERROR.—Demurrer.—Record.—Where a demurrer has been sustained to a complaint, and an amended complaint has been filed, to which a demurrer has been overruled, the ruling on the demurrer to the original complaint cannot be assigned for error, and the clerk should not certify that complaint as part of the record.

BILL OF EXCEPTIONS.—Filing of.—Leave was granted on the 30th of May to file a bill of exceptions within sixty days, and on the 30th day of July the bill was filed.

Held, that the bill of exceptions could not be regarded as properly in the record.

APPEAL from the Allen Circuit Court.

DOWNEY, J.—Several questions of interest are discussed

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by counsel, in neatly prepared printed briefs, in this case, but we cannot consider any of them.

The first error assigned is, that the court improperly sustained the defendants' demurrer to the original complaint. But this cannot be assigned for error as there was an amended complaint filed by the plaintiff covering the same ground, which was held sufficient, and on which the case was tried. Indeed the original complaint, in such a case, forms no part of the record, and should not be incorporated into it by the clerk. 2 G. & H. 273, sec. 559; *Downs v. Downs*, 17 Ind. 95.

It is also assigned for error that the circuit court improperly refused a new trial on the motion of the plaintiff. The final judgment was rendered on the 30th day of May, 1870; sixty days were given in which to file the bill of exceptions, and it was filed on the 30th day of July, 1870.

According to the recognized mode of computing time in such cases, we should exclude the 30th day of May, on which the judgment was rendered, and begin the count with the 31st day of that month, we then have one day in May, thirty in June, and thirty of July, counting the day on which the bill of exceptions was filed, which the rule requires us to do, making sixty-one days. This was not in time.

The proceeding was instituted to set aside a judgment, alleged to have been rendered without notice. The parol evidence is in the bill of exceptions, but the documentary evidence is not. The clerk has copied, outside of the bill of exceptions, certain papers, but, if the bill of exceptions was filed in time, we must hold that these papers are not before us. It does not appear, therefore, from the evidence in the bill of exceptions, that any such judgment was ever rendered against the plaintiff, as that of which he complains.

The judgment is affirmed, with costs.*

R. S. Robertson, for appellant.

W. G. Colerick and *D. H. Colerick*, for appellees.

*Petition for a rehearing overruled.

THE UNITED STATES EXPRESS COMPANY v. LUCAS and Others.

ATTACHMENT.—*Claims Filed Under.—Issue Between Attaching Creditors.—*

Where an action is brought on a claim, and the plaintiff takes out an attachment, and other creditors file their claims under the attachment proceedings, and the debtor fails to defend, and said other plaintiffs in the attachment file an affidavit that the attached property is insufficient to pay all the claims, and that their claims are just, and that the claim of the original plaintiff is not a legal liability against the defendant, and that said defendant will not appear and defend the action, and they ask to be allowed to defend, it is proper such defense should be permitted.

FOREIGN CORPORATION.—*Express Company.—Insufficient Statement.—Liability of Agent.—*

Where a foreign express company doing business in this State has failed to file in the proper recorder's office a statement which is a full compliance with the requirements of the statute, stating the amount of capital employed in its business; although such company cannot recover on a bond given by an agent for the discharge of the duties of said agency, still it may maintain an action against the agent to recover for money received in the course of his agency to the use of the company.

APPEAL from the Huntington Circuit Court.

DOWNNEY, J.—This was an action commenced by the appellant against Lucas, and in connection therewith an attachment was sued out against the property of Lucas, on the ground that he had left the State with intent to defraud his creditors. The plaintiff's claim against Lucas was for money had and received by him to and for the use of the plaintiff. Lucas made default. Hunter and several other creditors of Lucas, having filed their claims under the attachment, and become parties to the suit, were permitted by the court to defend against the claim of the express company, on the ground that Lucas was absent, was not intending to make any defense thereto, and that the same was unfounded.

They filed an answer of two paragraphs, but as the first was afterward withdrawn, no further notice need be taken of it. The second paragraph alleges that at the time of receiving the money charged in plaintiff's bill of particulars, and for a long time before, and ever since, the United States Express Company, plaintiff in this suit, was and is an associa-

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tion of persons usually called an express company, and also a foreign corporation, and were then, and ever since have been engaged in the business of carrying and transporting packages and parcels of money, bank notes, merchandise, and other articles over and upon the railroads, rivers, and other thoroughfares in this State and other states of the Union, and receiving and agreeing to receive compensation therefor, and were further engaged in the business of making collections and purchasing goods, merchandise, etc., in all the various towns and cities of the United States, and receiving compensation for such services; and that said company had employed said John H. Lucas to act as their agent in and for Huntington county, in the State of Indiana; that all the moneys mentioned in the complaint as having been received by said Lucas, were received by him in the course of his employment and agency in the business aforesaid in said county; that the business so carried on by said company, and so conducted by said company through said agent, was wholly unlawful, in this, to wit: that at no time, at or during the employment of said Lucas as their agent, nor at any time before or since the employment of said Lucas as their agent, or at the time said money came into his hands as such agent, as mentioned in the complaint and bill of particulars, did such express company furnish, though often requested, to said Lucas the power of attorney, commission, appointment, or other authority, under or by virtue of which he was empowered to act as such agent, nor did said company or the said Lucas, their agent, file in the office of the clerk of the circuit court of Huntington county, Indiana, before commencing the duties of said agency, nor either of them at any time since file, any duly authenticated order, resolution, or other sufficient authority of the board of directors, trustees, or managers of said United States Express Company, authorizing citizens or residents of the State, having a claim or demand against said United States Express Company, arising out of any transaction in this State with such agent, to sue for and maintain an action in respect

to the same in any court of competent jurisdiction in this State, and authorizing service of process in such action on such agent to be valid service on said corporation, and that such service should authorize judgment, etc., against said United States Express Company; all of which facts said company very well knew; nor at any time since, nor while said Lucas was engaged in the employment and agency, did said express company, as then organized, file with the recorder of Huntington county, or in the office thereof, and in which said agency was carried on, and in which said United States Express Company had an office all the time aforesaid, a statement showing the full name of every member of said association and company, and the proper place of residence of each such member, and the amount of capital employed in said business, and an agreement that legal process served on such agent of said express company shall be deemed and taken as good service upon said company or association; all of which they wholly omitted to do in the manner and form prescribed by statute in such cases made and provided; and defendants further aver that said United States Express Company is a foreign corporation, and not organized under the laws of the State of Indiana; and defendants further aver that all of the property of said Lucas, subject to execution, will not exceed ten thousand dollars; that the just and valid claims of parties joined in this answer, against which there is no legal defense, will amount to one thousand dollars; that the United States Express Company has filed a claim of ten thousand dollars; that there is a good, valid, and legal defense to the whole of the said claim, but that said Lucas will not defend against the same, nor set up said defense, but will suffer said company to recover the full amount of ten thousand dollars, whereby the property aforesaid will be exhausted and the parties will be unable to recover more than a small part of their claim; wherefore, they ask to file their answer to the complaint of the said United States Express Company against Lucas, and for judgment against said plaintiff for costs.

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The plaintiff demurred to this paragraph of the answer, assigning as ground of objection to it, that it did not state facts sufficient to constitute a defense. This demurrer was overruled, and an exception taken.

The plaintiff replied in two paragraphs, but afterward withdrew the first, so that no question is made with reference to it. In the second it is alleged that the company, on the 6th day of June, 1856, filed and caused to be recorded in the office of the recorder of said Huntington county a written statement, a copy of which was therewith filed, and also caused the same to be published in the Indiana Herald, a weekly newspaper printed and published, and of general circulation in said county.

The statement referred to in the reply is as follows:

"STATE OF INDIANA, HUNTINGTON COUNTY, ss:

A statement respecting the affairs of the United States Express Company, made pursuant to an act of the legislature of the State of Indiana, entitled an act declaring express companies to be common carriers, and providing for the safety of articles entrusted to their care, approved March 5th, 1855. The business of said company is managed, and its property and effects are owned by five trustees, whose full names and proper places of residence are as follows: Danford N. Barney and James McKay, both of the city of New York, Elijah P. Williams of the city of Buffalo, in the State of New York, and Asbel H. Barney of the city of Cleveland, in the State of Ohio, and one vacancy. The persons interested as *cestui que trust* are the stockholders of said company, who change from day to day, and of whom it is impossible to make an accurate statement, owing to the frequency of such changes. The amount of capital employed in the business of said company in the State of Indiana is, as nearly as the same can be ascertained, five thousand dollars. And we, the subscribers, the trustees above named, do hereby agree that legal process served upon any authorized agent of said company, in said county, shall be deemed and taken as good service upon said company and ourselves."

Dated the 25th day of April, 1856, and signed and sworn to by the trustees on the 26th day of April, 1856, as to part of them, and on the 31st day of May, 1856, as to the others, before a commissioner for Indiana, in New York, and certified to have been recorded in the office of the recorder of Huntington county on the 6th day of June, 1856. There was also filed an affidavit of the editor and publisher of said newspaper, that the above statement was published in that paper on the 11th and 18th days of June, 1856.

The parties admitted to defend demurred to this paragraph of reply, and the demurrer was sustained, to which the plaintiff excepted.

The plaintiff declining to plead farther, or amend his reply, judgment was rendered for the defendants.

The affidavits or petitions on which the defendants were admitted to defend are set out in a bill of exceptions; the question is reserved, as to the correctness of the action of the circuit court in thus allowing them to defend, and that is the first error properly presented for our consideration. This is a question of practice, and one of some importance. The statute, 2 G. & H. 147, sec. 186, authorizes any creditor of the defendant, upon filing his affidavit and written undertaking, as required of the attaching creditor, at any time before the final adjustment of the suit, to become a party to the action, file his complaint, prove his claim or demand against the defendant, and have any person summoned as garnishee, or held to bail, and propound interrogatories to the garnishee and enforce answers thereto, in like manner as the creditor who is plaintiff. But after a creditor has been thus admitted as a party to the action, can he dispute the claim of the attaching creditor, and can the attaching creditor controvert the correctness of his claim? It is evident that in such cases, where the attached property will not pay all, each creditor has a direct interest in seeing that no more of any claim shall be allowed than is justly due. There must be some mode by which this can be prevented. If it cannot be done in the attachment proceeding, it should be allowed in

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some other way. If there has been personal service on the defendant, or he appears, the plaintiff is entitled to a personal judgment against him. 2 G. & H. 148, section 188. This the other creditors have no interest in preventing, except so far as it might be ordered to be paid out of the proceeds of the property attached. The statute provides that "if judgment in the action be rendered for the plaintiff, or one or more of several plaintiffs, and sufficient proof be made of the goods, chattels, rights, credits, moneys and effects in the possession of the garnishee, the court shall also give judgment in favor of the plaintiff or creditors against the garnishee, or the property of the defendant, or both, as the case may require, which may be enforced by execution." 2 G. & H. 149, sec. 190. Also, "the money realized from the attachment and the garnishees shall, under the direction of the court, after paying all costs and expenses, be paid to the several creditors, in proportion to the amount of their several claims as adjusted, and the surplus, if any, shall be paid to the defendant." 2 G. & H. 150, sec. 192.

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." 2 G. & H. 218, sec. 368.

In holding that the court may allow one or more of the creditors to controvert the claims of one or more of the other creditors, when the defendant does not make a *bona fide* defense, we think we are but carrying out the spirit of the code, which seeks to settle, as far as possible, all questions which may properly arise between the parties in the same suit. The restraint which will result from a fear of incurring the expenses of the litigation will prevent causeless defenses. In this case, it was stated, under oath, in the application to the court for leave to defend, that the defendant was not appearing and would not defend, that there was a valid defense, etc. We think the court did not err in allowing the defense to be made. See *Fletcher v. Holmes*, 25 Ind. 458.

Another question arises on the ruling of the court in sustaining the demurrer to the second paragraph of the reply. Its insufficiency is urged on the ground that the statement filed by the company in the office of the recorder was defective. The statute, 1 G. & H. 327, sec. 2, requires the statement, among other things, to show "the amount of capital employed in such business." The statement which was made by the company, as above set out, gives only the amount of capital employed by the company in the State of Indiana, and is therefore not in accordance with the law. This question was decided by this court in the case of *Barney v. Daniels*, 32 Ind. 19. The language of the learned judge who delivered the opinion in the case is as follows: "Another objection to the statement is, that it does not show the whole amount of capital employed by the company in its business, but only the probable amount employed in its business in this State. These express companies have been called into existence by the widely extended system of railroads in the United States, with which they are immediately connected. The United States Express Company was organized in the State of New York, where three of the trustees named in the statement filed reside. It transacts a large business, extending, at least, into many of the States, and through its multiplied agencies receives daily a large number of valuable packages for transmission. The capital employed in its business constitutes a common fund, and is alike liable for all its obligations. And it was evidently the intention of the statute to require a statement of the entire amount of the capital employed by such companies in the express business, and not merely the amount that might be employed in this State."

The demurrer to the reply was therefore correctly sustained.

The remaining question is as to the sufficiency of the second paragraph of the answer, to which a demurrer was filed, and which was overruled. The paragraph of the answer in question shows that the company and Lucas, the agent, had not complied with the requirements of the statute,

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and that the money sued for was received by Lucas in the course of his employment and agency in the express business of the company in Huntington county.

In the case of *Barney v. Daniels*, referred to above, this court decided that an action would not lie against the agent and his sureties on their bond in favor of the express company, for moneys received by the agent, while acting as such, for services rendered by the company, the company not having complied with the statute.

In *Daniels v. Barney*; *Same v. Wells*, 22 Ind. 207, this court said, in treating of the question as to the liability of the agent for the money received, notwithstanding the illegality of the business out of which it grew; "It may be that if this suit had been brought against the agent himself, upon an implied assumpsit to pay over money received to the use of his principal, it would have rested upon a principle free from doubt. But this is not such a suit." And in *Barney v. Daniels*, 32 Ind. 19, the court said, "It must be remembered that this is not a suit against the agent for money had and received to the use of the principal; but it is a suit on the bond against the agent and his sureties, to recover money received by the former in the transaction for the principal of illegal acts." These statements sufficiently show that the court did not in those cases intend to decide against the right of the principal to recover against the agent, in such a case, for money had and received.

We doubt very much whether the legislature intended, in the enactment of the statute in question, to produce or sanction any such consequences as that the agent, after having received the money of the principal, and after the transaction between the principal and third persons was completed, should be allowed to repudiate the agency and keep the money, applying it to his own use. The obligation of the agent to account for the money is separate and distinct from the contracts of the company with third persons, which were the subject-matters of the statute. To hold that the agent is not bound to account for the money received by him, is to sanc-

tion an act of the grossest dishonesty and bad faith on the part of the agent, without the accomplishment of any equivalent benefit to any one, or to the public. On account of some unintentional omission in an honest effort to comply with the law, for which the agent is probably as much in fault as the principal, the agent sets his principal at defiance, denies his right to the money, and not refunding it to the parties who paid it to him, is allowed to retain it himself.

But the question in this case is whether the agent is liable, where the action is not on the bond, but is for money had and received. "If money have been actually paid to an agent for the use of his principal, the legality of the transaction, of which it is the fruit, does not affect the right of the principal to recover it out of the agent's hands. For though the law would not have assisted the principal, by enforcing the recovery of it from the party by whom it was paid, because it is the policy of the law not to aid the completion of an illegal contract, yet, when that contract is at an end, the agent, whose liability arises solely from the fact of having received money for another's use, can have no pretence to retain it." *Dunlap's Paley's Agency*, 62.

Judge STORY, in his work on Agency, sec. 347, says: "If money due to a principal on an illegal transaction should be paid over to his agent for him by the party from whom it is due, it has been held that the principal may recover it from the agent; for the contract of the agent to pay the money to his principal is not immediately connected with the illegal transaction; but it grows out of the receipt of the money for the use of his principal."

We have examined the cases, on the authority of which these eminent authors have thus laid down the rule applicable to the question under consideration, and are satisfied that it is correct. But see *Brooks v. Martin*, 2 Wal. 70; *Farmer v. Russell*, 1 B. & P. 296; *Murray v. Vanderbilt*, 39 Barb. 140.

We think the agent is estopped to dispute the title of his

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principal to the money which he has received for him. A tenant cannot dispute the title of the landlord, under and by virtue of which he obtained possession of the premises. A bailee cannot dispute the title of the bailor from whom he received the thing bailed; especially, he cannot set up title in himself. Why should an agent be allowed to place himself in a position of hostility to his principal and himself claim that which he has received for him? Paley on Agency, p. 10 and note k, and authorities there cited.

We are of the opinion that the second paragraph of the answer contained no sufficient defense to the action.

Judgment reversed, with costs, and the cause remanded.*

J. R. Coffroth and *J. R. Slack*, for appellant.

W. C. Kocher, B. M. Cobb, Ibach & Stults, and *H. N. Ward*, for appellees.

*Petition for a rehearing overruled.

THE CLEVELAND, COLUMBUS, CINCINNATI, AND INDIANAPOLIS
RAILWAY COMPANY v. CROSSLEY, Executor.

RAILROAD.—*Injury to Animals.*—*Fence.*—In an action to recover the value of a horse killed by the cars of a railroad company, the court instructed the jury that the company would be liable, if the horse was killed at a point on the road not securely fenced, and where it could have been fenced without interfering with the rights of the public.

Held, that the instruction was not erroneous.

SAME.—*Release.*—*Partition Fences.*—The release of a right of way through his lands by the plaintiff in such an action, and the building of fences along the line of the railroad through the lands by the railroad company, and the use of the fields adjoining for pasturage by the plaintiff, relying on the fences for protection to his cattle, will not make the fences partition fences, which the plaintiff would be bound to keep up.

SAME.—A land-owner released to a railroad company the right of way through his land, and further released and relinquished to the company "all damages

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and rights of damages, actions and causes of action, which I might sustain or be entitled to by reason of anything connected with, or consequent upon, the location or construction of said work, or the repairing thereof when finally established or completed."

Held, that said release in no manner related to actions for damages for the injury or destruction of cattle by the running of cars along the railroad.

APPEAL from the Madison Circuit Court.

DOWNEY, J.—The appellee sued the appellant, in the circuit court, to recover the value of a horse, the property of his testator, alleged to have been killed by the locomotive and cars of the appellant on its railroad, at a point where the road passes through the farm of the testator, and where it was not fenced. No question as to the pleadings is made. There was a jury trial, verdict, and judgment for the plaintiff, a new trial having been refused. The only error assigned is the ruling of the court in refusing a new trial.

The reasons stated, in the written motion for a new trial, were, first, that the verdict was contrary to law; second, that it was not sustained by sufficient evidence; third, the giving of instructions first and second, in the general charge; and fourth, the refusal to give instructions number one, two, three, and four, asked by the defendant.

We have carefully read the evidence, which is all set out in the record, and have no doubt of its sufficiency to sustain the verdict.

We proceed to examine the instructions given and those refused. Those given were as follows: "The first question presented for your consideration in this case is, did the defendant, with their cars, kill the horse mentioned in the complaint, at a place where their road was not securely fenced, and where they could have fenced it without interfering with the rights of the public? If so, your finding should be for the plaintiff, otherwise for the defendant."

Second. "If your finding should be for the plaintiff, the next inquiry should be, what was the horse worth at the time of the killing? You should determine this question from the preponderance of the evidence."

The objection to the first of these charges given, in the

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language of the brief of appellant's counsel, is as follows: "The answer of the defendant, in the case at bar, sets up the negligence of Crossley in failing to maintain the fence as was his duty, and in knowingly and intentionally turning his animals on his pasture fields without any protection, and the evidence fully sustained it in every particular, and a new trial should therefore have been granted. But we insist further that these questions of negligence are questions of fact to be decided by the jury, but the court, by the first charge given, took from the jury every such consideration, and told them, as a matter of law, that if the defendants, with their cars, killed the horse mentioned in the complaint, at a place where their road was not securely fenced, and where they could have fenced without interfering with the rights of the public, they must find for the plaintiff. We think that this withdrawal from the jury of the entire defense was wholly unwarrantable and produced a wrong result on the trial."

The second paragraph of the answer alleges, in substance, that the railroad ran through the lands of the deceased; that the fences along the road on each side were partition fences; that the deceased refused to assist in keeping them up, and recklessly, carelessly, and wilfully pastured and kept his said horse, which was a breachy stallion, upon his land immediately adjoining the insufficient partition fences aforesaid, which it was his duty to repair as aforesaid, and by and through the negligence and wilful misconduct aforesaid caused his said horse to be upon defendant's said railroad track, and while on the same he was killed, without the fault of the defendant.

Issue was taken upon this, first, by a square contradiction, in general terms; and second, by the assertion that so much thereof as charges said deceased with recklessly, carelessly, and wilfully pasturing and keeping his horse upon said lands, adjoining to said supposed insufficient partition fences, was recklessly, carelessly, and wilfully untrue, and that the fence was not a partition fence, but was one made exclusively for the use and benefit of the company, was burned down, and

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by said company recklessly, carelessly, and wilfully allowed to remain down, etc.

There was no evidence that the fence was, or ever had been a partition fence, but on the contrary, the evidence showed that it was built by the company. The company cannot say that it was negligence on the part of the deceased to allow his animals to pasture in his fields adjoining the railroad. It was the duty of the company, if she would put the plaintiff to proof of negligence, to "fence in" the road. There was no evidence of negligence to be left to the jury, and the court committed no error in not putting the question of negligence to them. See *The Jeffersonville, Madison, and Indianapolis Railroad Company v. Nichols*, 30 Ind. 321; *The Jeffersonville, etc., R. R. Co. v. Dunlap*, 29 Ind. 426; *The Bellefontaine Railway Co. v. Reed*, 33 Ind. 476.

No objection is urged to the second charge given, and we cannot see any. If the jury found for the plaintiff, we see no reason why he was not entitled to recover the value of the horse.

In the first of the charges refused, the court was requested to tell the jury, that if the deceased had released the right of way, and if the railroad company built the fences along its road, and the deceased used and relied on them to keep his cattle off of the railroad, and to separate his lands therefrom, it was a partition fence and he and the defendant equally bound to maintain the fence.

We think the facts enumerated would not make the fence a partition fence which deceased would be bound to help keep up. In the second charge the court was requested to say, that if the fence was a partition fence, as indicated, and the deceased knew of its bad condition, and pastured his horse on his lands adjoining the same, and while so pasturing he came upon defendant's railroad through the defective fence and was killed, the plaintiff cannot recover.

This charge was rightly refused, because the fence was not shown to have been a partition fence. The evidence was the

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other way. In 1848, the deceased executed to the company a release of the right of way over his said lands, and in it he said, "and I hereby further release and relinquish to the president and directors of the Indianapolis and Bellefontaine Railroad Company all damages and rights of damages, actions and causes of action whatsoever, which I might sustain or be entitled to by reason of anything connected with, or consequent upon the location or construction of said work, or the repairing thereof, when finally established and completed." This instrument was in evidence, and in the third charge asked by the defendant, the court was requested to say to the jury, "if Crossley, deceased, released, in the year 1848, the right of way to the defendant, and all damages resulting therefrom, he is estopped from claiming damages for maintaining fences or animals killed by the trains of the company, and cannot recover in this action."

The release in question, as we have seen, was only a release of the right of way, and of all damages resulting from the location, construction or repair of the road. It had no relation to such causes of action as that for which this suit is brought. To hold that the deceased, or his personal representative would be estopped to bring and maintain the present action, would require the application of some rule of law of which we have no knowledge, and to which we have not been referred.

The fourth charge asked was this: "The release of right of way given in evidence, if executed by the decedent, is a release of all damages resulting from a failure to maintain fences along the line of the defendant's right of way."

It would be according to this document an unusual efficacy, as a release, to hold that it was a good discharge of a cause of action which originated twenty-one years after its execution. Its language has no relation to such a cause of action. For any damages resulting from the location, construction, or repair of the road, it is probable that no action could be brought. But it is no bar in this case.

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The judgment is affirmed, with ten per cent. damages and costs.

J. A. Harrison, for appellant.

H. Craven, for appellee.

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THE NORTH-WESTERN CONFERENCE OF UNIVERSALISTS v.
MYERS and Others.

SUBSCRIPTION.—*Consideration.*—*Corporation.*—*Trustee.*—In a suit upon a subscription of money to the North-western Conference of Universalists, for the purpose of establishing a school in Indiana to be under the control and patronage of the Universalist church of said State, alleging that the same was due and expenses had been incurred on the faith of its payment;

Held, that sufficient consideration was shown to support the promise, and that the location of the school was not a condition precedent to the payment of the subscription.

Held, also, that the North-western Conference of Universalists could sue without alleging generally that they were a corporation or showing facts making them a corporation.

Held, also, that this body could sue as the trustee of an express trust.

ADMINISTRATION.—*Suit against Widow and Heirs.*—The action was brought against the widow and heirs of the subscriber, and the complaint alleged that the decedent had left five thousand dollars in real estate and personal property, and that there had been no administration.

Held, that the action could not be sustained against the widow and heirs.

APPEAL from the Wayne Common Pleas.

BUSKIRK, J.—This suit was against the widow and heirs of Gideon Myers, deceased, on a written agreement or subscription to pay the plaintiff, for school purposes, the sum of one hundred dollars. The agreement was in these words: "We, whose names are subscribed, agree to pay the sum set opposite our names, to the North-western Conference of Universalists, for the purpose of establishing a school in Indiana, to be under the patronage and control of the Universalist church in said State. All subscriptions of twenty-five dol-

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lars and upwards, payable one-half on or before the 1st day of January, 1869, and one-half six months thereafter. All sums of less than twenty-five dollars payable January 1st, 1869. Cal. H. Tripp, one hundred dollars; Gideon Myers (made August, 1868), one hundred dollars."

The complaint, in substance, is this: that Gideon Myers died intestate; that he left a widow, said Catharine, and the children therein named, and none others; that he left five thousand dollars worth of personal and real estate; that no administration had been granted on his, the said Gideon's, estate; that prior to his death the said Gideon had in writing, the one heretofore set out, agreed and promised to pay the plaintiff one hundred dollars, for the purpose of establishing a school in Indiana, to be under the patronage and control of the Universalist church in said State. The complaint further states that such school had been established; and as a further consideration, it is alleged that upon the faith and promise aforesaid of the said Gideon and others, the plaintiff had been at great expense, and had paid out large sums of money in procuring other subscriptions for the purposes of said school, in collecting money for the same, in procuring a location for the erection of a school building in said State, for the purpose aforesaid; that the said sum of one hundred dollars is due and unpaid; and a judgment for one hundred and twenty-five dollars is demanded.

The defendant demurred to the complaint. The demurrer assigned two causes; first, the facts stated did not constitute a cause of action; second, that there was a defect of parties plaintiffs. This demurrer was sustained by the court below, and the plaintiff at the time excepted in the record. The plaintiff refused to amend, and judgment was rendered for the defendants. Herein lies the error complained of by the appellant.

The first objection urged to the sufficiency of the complaint is, that there is no consideration to sustain the promise. There is nothing in this objection. *Johnston v. The Wabash*

College, 2 Ind. 555; *Peirce v. Ruley*, 5 Ind. 69; *Jewett v. Salisbury*, 16 Ind. 370, and authorities there cited.

The next objection urged is, that the complaint does not allege and show where the school had been located in the State of Indiana. The agreement did not provide that it should be located at any particular point, nor does the location of the school constitute a condition precedent to the payment of the money. The objection is not well taken.

It is next earnestly contended that the complaint is defective, because it is not averred and alleged that the plaintiff is a corporation, and therefore entitled to sue.

In a suit by a corporation, it is not necessary that the existence of the corporation shall be averred, either generally or by specially alleging facts necessary to show its organization pursuant to law. Nor need the fact be proved unless especially put in issue by plea, the general denial not being sufficient to raise the question. *Jones v. The Cincinnati Type Foundry Company*, 14 Ind. 89; *Cicero Hygiene Draining Company v. Craighead*, 28 Ind. 274, and the numerous authorities there cited.

It is also insisted that there is a defect of parties plaintiffs. The position assumed is, that the Universalist church of Indiana was the beneficiary, and that the suit should have been brought in its name. The contract was made with the North-western Conference of Universalists. The express agreement was to pay the money to such body. The school was to be under the patronage and control of the Universalist church of Indiana, but there was no agreement to pay the money to such church. It is well settled by numerous decisions of this court, and they are in accord with the whole current of authorities, that a person who contracts with a corporation is estopped from denying the existence of such corporation.

But conceding that the Universalist church of Indiana was the beneficiary, yet, as the agreement was to pay the money to the North-western Conference of Universalists, that body was made the trustee of an express trust, and as such entitled

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to maintain this action. Section four of the code (2 G. & H. 37) reads: "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

This question was considered with great care, not only on the original hearing, but also on the petition for a rehearing, in the case of *Heavenridge v. Mondy*, 34 Ind. 28, and should now be regarded as settled.

But there is another objection to the complaint that seems to be fatal to the right of the plaintiff to recover in this action.

The action is brought against the widow and heirs of Gideon Myers, deceased, upon a promise made by him in his lifetime. It is alleged in the complaint that no administration has been granted on said estate; and that he left five thousand dollars in personal and real estate. There is no allegation as to the number or amount of the debts against the said estate, nor does the plaintiff profess to sue for itself and other creditors, and seek an administration of the assets in chancery. Nor is it alleged that the widow and heirs of the said decedent received the real and personal estate of which it is alleged that he died seized, nor in what proportion it was so received.

The policy of our laws seems to require that letters of administration shall be taken upon the estate of every person dying testate or intestate, and that the estate shall be settled according to the statute regulating the settlement of decedents' estates, where the estate exceeds in value five hundred dollars. The necessity for this is obvious. The widow is entitled to a certain portion of the real and personal property against the heirs and creditors, while the heirs are not entitled to any portion of the estate until the debts are paid.

By section 151 of the law providing for the settlement of

decedents' estates, 2 G. & H. 527, it is made the duty of every executor or administrator to institute all suits for any demand of whatever nature due to the decedent in his lifetime. Besides, the widow, heirs, legatees, devisees or distributees would make themselves liable as executors *de son tort*, if they should intermeddle with the estate. Section 15, 2 G. & H. 488. And where a testator devises and bequeaths certain specific property, the legatees cannot take possession of the property without the consent of the executor. *Leach v. Prebster*, 35 Ind. 415.

It is expressly provided by sections 137 and 138, 2 G. & H. 524, that the surplus after the payment of debts and legacies shall be distributed to the legal heirs.

Section 178, 2 G. & H. 534, reads as follows:

"The heirs, devisees, and distributees of a decedent, shall be liable to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to such final settlement was insane, an infant, or out of the State; but such suit must be brought within one year after the disability is removed."

By this section the heirs, devisees, and distributees are only liable to the extent of property received by each, and this liability does not exist unless there has been a final settlement of the estate, and the creditor had been insane, an infant or out of the State for six months prior to such final settlement.

It is not necessary for us to decide, in this case, whether the heirs, devisees, or distributees are liable to a creditor to the extent of the property received, where there has been no administration upon the decedent's estate, but if the right exists, the action cannot be maintained by a single creditor, but such creditor must sue for himself and all other creditors, so that there may be an administration in chancery of the assets, and a proper application of the money to the payment of all the debts, if there is a sufficiency of assets, and if not a *pro rata* distribution. *Barton v. Bryant*, 2 Ind. 189.

Where a decedent dies, testate or intestate, leaving real es-

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tate worth less than ten thousand dollars, one-third thereof descends to his widow, in fee, free from all demands of creditors. Section 17 of law of descent, 1 G. & H. 294. The widow is also entitled to five hundred dollars of the personal estate as against creditors. See acts of 1871, p. 46.

It is alleged in the complaint that the real and personal estate of the decedent was only worth five thousand dollars. In such a case the widow would not be liable to creditors, for the property so received by her. It is quite obvious to us that the complaint showed no cause of action against the widow of Gideon Myers. We are also of the opinion that the heirs of the said decedent are not liable in this action. If there is a liability against the estate of the said decedent, upon his promise and agreement, it must be enforced in a proceeding very different from the one now under consideration.

The judgment is affirmed, with costs.

W. A. Peelle and *H. C. Fox*, for appellant.

W. S. Ballenger, for appellees.

THE CINCINNATI AND MARTINSVILLE RAILROAD COMPANY and
Another *v.* PASKINS.

RAILROAD.—Injury to Animals.—Pleading.—In a suit against two railroad companies, the complaint charging that a horse was killed on the road of one of the companies, where the track was not securely fenced, by the cars of the other company, passing over the road in charge of the officers of the latter company;

Held, that the averments were not sufficient to charge either company with liability under the statute, as the railroad corporation owning the track was not shown to have authorized the use of its road; nor was the company owning the cars alleged to have been controlling or running the road in the corporate name of the corporation owning the road, either as lessees, assignees, receiver, or otherwise.

APPEAL from the Johnson Common Pleas.

DOWNNEY, J.—The appellee sued the appellants, alleging in his complaint that on the 18th day of November, 1868, at and in Johnson county, Indiana, the Indianapolis, Cincinnati, and Lafayette Railroad Company, while running and propelling their locomotives and cars along and upon that part of the road of the Cincinnati and Martinsville Railroad Company which is situated in said county of Johnson, and without any fault or negligence of the plaintiff, ran over, crippled, and injured one horse, the property of the plaintiff, of the value of one hundred and fifty dollars, whereby said horse was damaged and rendered worthless; and that at the time and place when and where said horse entered upon said railroad track, and where said injury was inflicted, said road was not securely fenced in, and such fence properly maintained; wherefore, etc.

A demurrer to this complaint, in which both companies united, was filed by them and overruled by the court. This is the first ground of complaint against the action of the common pleas.

It is contended by the appellants that the complaint fails to show a cause of action against either of them; that it fails to allege a cause of action against the Cincinnati and Martinsville Company, because it does not allege that the cars by which the horse was injured were the cars of the said company, or of any other company running and controlling the road in the corporate name of that company, or that they were run with the consent, or even with the knowledge of that company; that so far as anything appears in the complaint, the Indianapolis, Cincinnati, and Lafayette Company may have been simply a trespasser on the road of the Cincinnati and Martinsville Company. And that it does not show a cause of action against the Indianapolis, Cincinnati, and Lafayette Company, because it does not state either that that company owned the road, or that it was running and controlling it in the corporate name of some other company owning it; that one or the other of these facts must exist, or the Indianapolis, Cincinnati, and Lafayette Company

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is only liable for negligence; that as it is sought to fix upon the company a purely statutory liability, the complaint ought to show clearly and unequivocally the facts necessary to bring the case within the statute.

We think it is quite clear that the Cincinnati and Martinsville Company is not liable upon the facts stated in the complaint. It is not shown that that company leased its road to the Indianapolis, Cincinnati, and Lafayette Company, or had, in any way, consented to the use of its road by that company.

But the two companies having united in the same demurrer, if the complaint is good as to either of them, the demurrer was correctly overruled. *Teter v. Hinders*, 19 Ind. 93; *Estep v. Burke*, 19 Ind. 87. Was the complaint sufficient as to the Indianapolis, Cincinnati, and Lafayette Company?

The statute provides, "that lessees, assignees, receivers, and other persons, running or controlling any railroad in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent and according to the provisions of this act." 3 Ind. Stat. 413, sec. 1.

The subsequent sections provide for the manner of enforcing such liability. In *The Indianapolis and Madison Railroad Company v. Solomon*, 23 Ind. 534, it was held that where animals are killed by the train of another company running in its own name, and in its own behalf, and under its control, over a part of the track of the defendant, the owner of the road, under a contract for that purpose between the two companies, the company owning the road was liable under the statute.

But the exact question which is now presented has not, so far as we are aware, been decided by this court. In order to make the Indianapolis, Cincinnati, and Lafayette Company liable, jointly or severally, with the company owning the road, the Cincinnati and Martinsville Company, it must

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have been running or controlling the road of that company, in the corporate name of such company, either as lessee, assignee, receiver, or otherwise. The complaint contains no allegation to this effect, and for this reason, we think, did not show any cause of action against the Indianapolis, Cincinnati, and Lafayette Company. If it had been alleged, which may be the fact for aught we know, that the Indianapolis, Cincinnati, and Lafayette Company was running the Cincinnati and Martinsville Company's road, in its name, under a lease from it, this would have rendered both companies liable, either jointly or severally, for the injury done. There seems to be no defect in the law in this respect, but simply a failure on the part of the pleader to make a case coming within the statute. We are not authorized to extend the liability of the company to cases not falling within the terms of the statute.

The demurrer to the complaint should have been sustained.

The other questions made relating to the action of the court in striking out a part of the answer, and the refusal to grant a new trial, need not be considered.

Judgment reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint, grant leave to amend, if desired, and for further proceedings.

D. W. Howe, for appellants.

G. M. Overstreet and *A. B. Hunter*, for appellee.

HOLMES v. WRIGHT.

COSTS.—*Title to Real Estate.*—*Bill of Exceptions.*—In an action in which under the pleadings, or under an agreement of the parties, evidence may be introduced bringing in issue the title to real estate, and yet the suit may be determined without such evidence, the Supreme Court will look to the bill of excep-

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tions to determine from the evidence whether that issue was before the jury, and will decide the question of costs between the parties accordingly.

SAME.—Trial by Court.—Where the court tries a case, it takes the place of a jury, and the question of costs is no part of the finding, but of the judgment upon the finding, and the law as applied to it, and the character of the evidence upon which it is based.

APPEAL from the Jackson Circuit Court.

WORDEN, C. J.—Complaint by the appellant against the appellee, alleging that the defendant wrongfully entered upon certain lands therein described, belonging to the plaintiff, and of which he was in the possession, and trampled and beat down the grass thereon, and tore and cut up the soil, and took and carried away three thousand rails in a fence on said land, and turned the plaintiff's cattle and hogs, feeding and pasturing on said land, out into the highway, etc.

The general denial was filed, and an agreement of the parties entered into, that special matters of defense and reply might be given in evidence which could be given under any valid pleading.

The cause was tried by the court, who found "for the plaintiff two dollars and twenty-five cents, and that said plaintiff recover an equal amount of costs, to wit, two dollars and twenty-five cents, and as to the other costs each party pays the costs made by him."

Judgment was rendered according to the above finding, and exception was taken by the plaintiff.

The only question presented here is whether the appellant was entitled to recover his full costs.

That part of the finding which relates to the costs is no legitimate part of the finding, and may be regarded as stricken out; leaving a general finding for the plaintiff for the amount specified. The court, in the trial of a cause, takes the place of a jury, who have nothing to do with the costs, and cannot by their verdict determine who shall pay them. *Conner v. Winton*, 8 Ind. 315. The costs are determined by the law, as applied to the particular case made, and it is the province of the court, after a finding has been made, or a verdict returned, to determine, having in view the

nature of the case, and the amount of the finding or verdict, how the law adjudges the costs.

The question arises whether, on the case tried and the finding had, the law entitled the plaintiff to more costs than damages, or in other words, to full costs. A party is entitled to full costs, unless some different provision is made by law. But the statute provides, that "in all actions for damages solely, not arising out of contract, if the plaintiff do not recover five dollars damages, he shall recover no more costs than damages, except in actions for injuries to character and false imprisonment, and where the title to real estate comes in question." 2 G. & H., 227, sec. 398.

In the case before us the pleadings put in issue the title to real estate; that is to say, the title to the land on which the trespass was charged to have been committed was alleged to have been in the plaintiff, and this was controverted by the general denial filed by the defendant. But this is by no means decisive of the question. The cause might have been tried without the title to real estate in any manner coming in question. The plaintiff, having alleged possession, as well as ownership, might have maintained his action on proof of possession, without proof of title, as possession simply is sufficient to maintain an action against a mere wrong-doer. So again, the title of the plaintiff might have been conceded, and the defense rested on a denial by the defendant of the acts imputed to him; and, indeed, under the agreement to admit all matters of defense and reply without pleading them, there are many ways in which the cause might have been tried without bringing in question the title to the land.

In order to determine whether the title to real estate came in question, we must, unless it is otherwise shown, look to the evidence offered upon the trial. This is illustrated by many cases in our reports.

Thus, in *Dodd v. Sheeks*, 5 Blackf. 592, which was trespass *quare clausum*, in which it appeared by bill of excep-

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tions that the title to real estate was not brought in question, it was held that the plaintiff was not entitled to recover more costs than damages. In *Rogers v. Perduc*, 7 Blackf. 302, suit was brought before a justice of the peace on a note. The defendant pleaded that the note was given for land to which the payee had no title. It was held that there were two answers that could be given to the plea; first, a denial of the alleged consideration; and second, that the payee had title, etc. The former would not take away the jurisdiction of the justice, while the latter would; and inasmuch as it did not appear from the evidence that proof was offered on the latter proposition, the court would presume there was none.

In *Burnett v. Coffin*, 4 Ind. 218, which was an action for overflowing lands by means of a mill-dam, it was held that although the title to real estate might have come in question under the general denial, yet as the evidence was not in the record, it would be presumed, in favor of the ruling of the court on the subject of costs, that it did not.

In *Cromwell v. Lowe*, 14 Ind. 234, the action was brought to abate a nuisance which injured land alleged to belong to the plaintiff, and of which he was in possession. It was held that although the plaintiff might not have been required to make out his title, yet as he offered in evidence his title deeds, sought an instruction on the point, and obtained a verdict, the title to real estate was put in issue, which ousted the jurisdiction of the court of common pleas.

In *Sinclair v. Roush*, 14 Ind. 450, the action was for overflowing the plaintiff's land by a mill-dam, and a question arose as to costs under the section of the statute above quoted. It was held that as it appeared by a bill of exceptions that the title to real estate did not come in question on the trial, the plaintiff's title being admitted, he was not entitled to full costs.

In *Barber v. Barber*, 21 Ind. 468, the action was for flowing water upon the plaintiff's land. He had alleged possession as well as ownership, and a question arose as to costs. It

was held that as the evidence was not in the record, the court would presume, in favor of the ruling below, that the title to real estate did not come in question.

There is another class of decisions growing out of section 397 of the statute, 2 G. & H. 227, that may be cited as illustrating the proposition, that the right to costs depends, in many cases, upon what is proven on the trial, and that this court will look into the evidence for the purpose of determining whether they have been rightly adjudged, presuming, however, in favor of the ruling below where the evidence is not in the record, and the facts do not otherwise appear. *Edmonds v. Paskins*, 8 Blackf. 196; *Dayton v. Hall*, *id.* 556; *Ham v. Gregg*, 1 Ind. 81; *Higman v. Brown*, 3 Ind. 430; *Foglesong v. Moon*, 5 Ind. 545.

The evidence in the cause is all in the record, and from that it appears, quite clearly, we think, that the title to real estate did come in question. The plaintiff and defendant were adjoining proprietors, and there was much evidence offered as to the location of the line dividing their lands, which could have been offered for no other purpose than to show whether the fence alluded to in the complaint stood on the land of the plaintiff, or of the defendant. The title to the land on which the fence stood clearly came in question. The plaintiff's title deeds were given in evidence, as were also several surveys, as well as other evidence tending to establish the boundary. Indeed, in finding for the plaintiff, the court, it would seem, must have found that the land on which the fence stood belonged to him; for if it did not belong to him, it belonged to the defendant, and the plaintiff's mere possession would have been unavailing against the owner.

It follows that the case is within the exception contained in the statute above quoted, and that the plaintiff was entitled to recover full costs.

The judgment below, in respect to costs, is reversed, with costs here, and the cause remanded, with instructions to the court below to render judgment for full costs in favor of the plaintiff.*

The State, *ex rel.* O'Brien, *v.* Dillon and Others.

J. S. Hester, D. H. Long, B. E. Long, and S. E. Perkins,
Fr., for appellant.

J. B. Brown, M. M. Ray, G. H. Voss, B. F. Davis, and J.
A. Holman, for appellee.

*Petition for a rehearing overruled.

THE STATE, on the Relation of O'BRIEN, *v.* DILLON and
Others.

TURNPIKE.—*Articles of Association.—Stock Subscription.—Length of Road.—*

Where an information was brought to inquire by what authority the defendants claimed to be a corporation under the name of a turnpike company, and it was alleged that the road, for the construction of which the corporation attempted to organize, was six miles and three quarters in length, and the stock subscribed was only three thousand dollars;

Held, on demurrer, that the complaint was sufficient.

APPEAL from the Madison Circuit Court.

DOWNEY, J.—This was a proceeding by *quo warranto* to inquire by what authority the defendants claimed to be a corporation under the name of "The Killbuck Turnpike Company." Their articles of association are set out in the complaint, and sundry objections are urged against them. We have examined them with reference to the objections made, and think that upon their face they are sufficient. It is alleged, however, that the length of the road is six and three-quarter miles. The amount of stock subscribed was only three thousand dollars. If these allegations are true the company could not legally file articles of association, and do business as a corporation. The statute requires five hundred dollars per mile of the proposed road, before the articles of association can be filed. 1 G. & H. 474 sec. 1. The length of the road is stated in the articles of associa-

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tion to be "about five and one-half miles." This statement, besides being indefinite, cannot be regarded as conclusive.

The court, having sustained a demurrer to the complaint or information, because it did not state facts sufficient to constitute a cause of action, committed an error.

The judgment is reversed, with costs, and the cause remanded.

W. O'Brien, H. Craven, W. R. Pierce, and H. D. Thompson, for appellant.

J. A. Harrison, I. W. Sansberry, E. B. Goodykoontz, and M. S. Robinson, for appellees.

THE STATE v. GIBSON.

CRIMINAL LAW.—*Marriage Between Whites and Negroes.*—*Fourteenth Amendment.*—*Civil Rights Bill.*—Neither the Fourteenth Amendment to the Constitution of the United States nor the Civil Rights Bill passed by Congress has impaired or abrogated the laws of this State on the subject of the marriage of whites and negroes. Such a union between members of the different races is a criminal offense by the statutes of this State.

APPEAL from the Vanderburg Criminal Court.

BUSKIRK, J.—It appears of record in this cause, that appellee was charged by indictment in the court below with having unlawfully and knowingly married, in the county and State aforesaid, one Jennie Williams, a white woman of this State, he then and there having one-eighth part or more of negro blood.

The indictment was, upon the motion of the appellee, quashed, and the State, by her prosecuting attorney, excepted and prosecutes this appeal to obtain a reversal of the judgment.

The indictment was based upon the forty-seventh section of the act defining felonies, which reads as follows:

"Section 47. No person having one-eighth part or more of negro blood shall be permitted to marry any white woman of this State, nor shall any white man be permitted to marry any negro woman, or any woman having one-eighth part or more of negro blood, and every person who shall knowingly marry in violation of the provisions of this section, shall, upon conviction thereof, be imprisoned in the State's prison not less than one, nor more than ten years, and be fined not less than one thousand nor more than five thousand dollars." 2 G. & H. 452.

The sole question which is presented for our consideration and decision is as to the correctness of the ruling of the court in quashing the indictment. It seems to be conceded by the appellee, that the indictment, under our code of criminal procedure, is good, in substance and matter of form, if the section of our statute above quoted is still in force; but it is earnestly maintained that all the laws of our State prohibiting the intermarriage of negroes and white persons were abrogated by the ratification of the fourteenth amendment of the constitution of the United States, and the passage of the civil rights bill. The position assumed by the attorney of the appellee is stated in these words:

"The appellee contends that all the laws of this State prohibiting the marrying of blacks and whites are abrogated by the fourteenth amendment to the constitution of the United States, and the law of Congress passed in pursuance to that amendment, which, in express terms, confers upon colored people the power of making contracts.

"Marriage, by the laws of Indiana, being only a civil contract, 1 G. & H. 428, sec. 1, it follows that the marriage specified in this indictment was lawful; and hence the judgment of the court is correct."

The only question presented for the decision of this court is, whether the position assumed by the appellee is correct. The magnitude and importance of the question involved cannot be overestimated, and we have given it our best and most thoughtful consideration. We approach its investiga-

tion, profoundly impressed with the weight of responsibility that our oath to support the Constitution of the United States and of the State of Indiana has imposed upon us.

The first section of the fourteenth amendment is in these words :

"Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

This amendment was proposed by Congress, June 16th, 1866, and declared by the Secretary of State to have been ratified July 28th, 1868.

This amendment contains four separate and distinct propositions: first, it confers the right of citizenship upon all persons born or naturalized in the United States, and who are subject to the jurisdiction thereof; second, it declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; third, it prohibits any state from depriving any citizen of life, liberty, or property, without due process of law; fourth, it provides that no state shall deny to any person within its jurisdiction the equal protection of the law.

It is settled by very high authority, that, in placing a construction upon a constitution or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy. The court should also look to the nature and objects of the particular powers, duties, and rights in question, with all the light and aids of cotemporary history, and give to the words of each provision just such operation and force, consistent with their legitimate meaning, as will fairly secure the end proposed.

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Kendall v. The U. S., 12 Pet. 524; *Prigg v. The Commonwealth*, 16 Pet. 539.

Guided by these wise and well settled rules of interpretation, we proceed to place a construction upon the section under consideration. The persons referred to in the section under examination are described as "all persons born or naturalized in the United States." The race or class of persons intended to be benefited are not described. It is quite manifest that it did not refer to persons of the white race, for when persons of that race are born in the United States, they are by birthright citizens, and when they are born elsewhere and have been naturalized under the law of Congress, they become citizens of the United States and of the state where they reside. We know from the history of the times that the main purpose of this amendment was to confer the right of citizenship upon persons of the African race, who had previously not been citizens. When these persons became citizens, they were entitled to the privileges and immunities secured to all citizens by section two, of article four, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," but the framers and advocates of this amendment seemed to be unwilling to rely upon the above section, and therefore added the other clauses which were intended to secure to the newly made citizens the full and equal protection of the law.

The learned attorney for the appellee has not informed us, in his brief, which one of the clauses of the said section has had the effect to abrogate our laws prohibiting the intermarriage of persons of the white and black races. It certainly cannot be the first, for the only object and effect of that clause was to confer the right of citizenship upon certain classes of persons who had not been theretofore citizens, and among these classes were persons of the African race.

Nor can the second clause be construed to have that effect. The purpose of this clause was to secure to the newly created citizens the same privileges and immunities which had

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theretofore been enjoyed by the former citizens of the United States. It is quite probable that this clause had reference to the political rights and privileges of the persons who had by the first clause been made citizens of the United States and of the state wherein they resided. The purpose of the third clause was to protect the persons referred to and embraced in the first clause, in life, liberty, and property. The plain and manifest intention was to make all the citizens of the United States equal before the law in all the states of the Union. The fourth clause seems to have been added in the abundance of caution, for it provides in express terms what was the fair, logical, and just implication from what had preceded it, and that was, that the persons made citizens by the amendment should be protected by the laws in the same manner, and to the same extent, that white citizens were protected.

The fourteenth amendment contains no new grant of power from the people, who are the inherent possessors of all power, to the federal government. It did not enlarge the powers of the federal government, nor diminish those of the states. The inhibitions against the states doing certain things have no force or effect. They do not prohibit the states from doing any act that they could have done without them. The constitution was made for the protection of all citizens. It is adapted to our condition in every state of our national advancement. When new territory is acquired or new citizens created, the constitution extends itself over and protects the territory and citizen in the same manner that it extended over and protected the original thirteen states and the men who achieved our independence, and made the constitution, and formed the union of the states. From the Atlantic to the Pacific, and from the lakes to the borders of Mexico, it has stretched forth its cherishing arm over our people, and diffused its blessings on all alike. The only effect of the amendment under consideration was to extend the protection and blessings of the constitution and laws to a new class of persons. When they were made citizens they were as much entitled to the protection of the constitution and the

laws as were the white citizens, and the states could no more deprive them of privileges and immunities than they could citizens of the white race. Citizenship entitled them to the protection of life, liberty, and property, and the full and equal protection of the laws. Nor has the ratification of this amendment in any manner or to any extent impaired, weakened, or taken away any of the reserved rights of the states, as they had existed and been fully recognized by every department of the national government from its creation. This amendment conferred citizenship upon persons of the African race, but we will hereafter inquire and decide whether citizenship conferred on them the right to intermarry with persons of the white race.

But it is urged that the civil rights bill has abrogated the section of our statute which renders it a felony for a negro to marry a white woman of this State, or for a white man to marry a negro woman. It is claimed that the first section of the said act which confers upon persons of the African race the right to make and enforce contracts has made it lawful for negroes, in all of the states, to make and enter into contracts of marriage with persons of the white race. The argument is, that under our laws marriage is a civil contract, and as negroes are authorized to make contracts, that, therefore, they can make any kind of contracts, notwithstanding the contract may be in violation of the laws of an independent and sovereign state. Waiving for the present the power of Congress to pass a law authorizing any class of persons to make and enforce contracts in a state, we proceed to examine the first section of the civil rights bill, and to determine whether the position assumed by the appellee is sustained thereby. In our opinion it is wholly untenable, and that this is demonstrated by the plain, express, and undoubted language of the said section.

The first section of the said act is in these words: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and that such

citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white persons, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

This act took effect on the 9th day of April, 1866, which was prior to the ratification of the fourteenth amendment. This amendment seems to have been mainly copied from, or modelled after the section above quoted from the civil rights bill. This section confers upon persons of the African race the power to make and enforce contracts. The power as conferred in the first part of the section is without limitation, but in the subsequent part of the section it is restricted and qualified by the plain and express declaration, that the rights conferred shall be enjoyed and exercised, in the same manner and to the same extent, "as is enjoyed by white persons." The only force and effect of this section was to confer upon persons of the African race the same civil rights, privileges, and immunities as had been enjoyed by persons of the white race.

It, therefore, becomes necessary for us to inquire whether Congress possesses the power, under the federal constitution, to pass a law regulating and controlling the institution of marriage in the several states of this union; and this will involve a brief inquiry into the nature and character of our complex system of government. Anterior to the adoption of the federal constitution, the states existed as independent sovereignties, possessing supreme and absolute power over all questions of local and internal government. The states

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were independent of each other, and each possessed the power to regulate and control its domestic institutions. The government of the United States was not created by the states acting in their sovereign capacity, but the people of the several states, acting in their individual capacity. The federal government was not created for the purpose of regulating and controlling the domestic and internal affairs of the states, but the purposes of its creation are declared in the preamble to the constitution, and these are "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty." The states being independent, they recognized no common head. They were competent to manage and conduct their local and internal affairs, but they needed a superior and central power to regulate commerce and intercourse between the states and with foreign nations. Indeed, the whole frame of the constitution supports this construction. All the powers which relate to our foreign intercourse are confided to the general government. Congress has the power to regulate commerce with foreign nations, and among the states, to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; to declare war, to grant letters of marque and reprisal; to raise and support armies; to provide and maintain a navy; to coin money, and regulate the value thereof; to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies in the United States; to establish post offices and post roads; to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions. The powers conferred on the general government are of a general and national character, and none of them authorize or permit any interference with, or control over, the local and internal affairs of the state. The general government is one of limited and enumerated powers, and it can exercise no power that is not expressly, or by implication, granted. The people being the inherent possessors of all governmental

authority, it necessarily and logically resulted that all powers not granted to the general government, or prohibited to the state governments, were retained by the states and the people, but the great, wise, and illustrious men who framed our matchless form of government were so jealous of the right of local self-government that they were unwilling to leave the question of the reserved powers to implication and construction. Hence, within two years after the adoption of the federal constitution, twelve amendments thereto were submitted by Congress to the states for ratification, which were ratified. The ninth and tenth amendments read as follows:

"9th. The enumeration, in the constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

"10. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Chief Justice CHASE, in *Lane County v. Oregon*, 7 Wal. 76, draws with great clearness and force the true line of distinction between the powers of the federal and state governments. He says, "the people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. The states disunited might continue to exist. Without the states in union there could be no such political body as the United States.

"Both the states and the United States existed before the constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers greatly restricted, only upon the states. But in many articles of the constitution the necessary existence of the states, and within their proper spheres the independent authority of the states, is distinctly recognized. To them near-

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ly the whole charge of interior regulation is committed or left; to them, and to the people, all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison, in the *Federalist*, thus: 'The federal and state governments are, in fact, but different agents and trustees of the people, constituted with different powers and designated for different purposes.'"

Mr. Justice Nelson, in delivering the opinion of the Supreme Court of the United States, in the recent case of *The Collector v. Day*, 11 Wal. 113, says: "It is a familiar rule of construction of the constitution of the Union, that the sovereign powers vested in the state governments by their respective constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the states, respectively, or to the people.' The government of the United States, therefore, can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states.

"Upon looking in the constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the states. Two of the great departments of the government, the executive and the legislative, depend upon the exercise of the powers, or

upon the people of the states. The constitution guarantees to the states a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the states in our complex system, as recognized by the constitution, and the existence of which is so indispensable that without them the general government itself would disappear from the family of nations, it would seem to follow as a reasonable, if not a necessary, consequence, that the means and instruments employed for carrying on the operations of their governments, for preserving their existence and fulfilling the high and responsible duties assigned to them in the constitution should be left free and unimpaired; should not be liable to be crippled, much less defeated, by the taxing of another government, which power acknowledges no limits but the will of the legislative body imposing the tax, and, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department and the appointment of officers to administer their laws. Without this power and the exercise of it we risk nothing in saying that no one of the states under the form of government guaranteed by the constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department. It would have been more accurate and in accordance with the existing state of things at the time to have said the power to maintain a judicial department. All of the thirteen states were in the possession of this power, and had exercised it before the adoption of the constitution, and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their constitutions, which remained unaltered and unimpaired, and in respect to which the state is as independent of the general government as that government is independent of the states."

In the case of *Fifield v. Close*, 15 Mich. 505, this language

occurs: "The same supreme power which established the departments of the general government, determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the constitution, which limits them, and independent of other agencies, except as thereby made dependent. There is nothing in the constitution which can be made to admit of any interference by Congress with the secure existence of any state authority within its lawful bounds."

Nor are we without authority in this State, sustaining and upholding the rights and powers of the State. This court, in *The State v. Garton*, 32 Ind. 1, says: "And has this principle, vital indeed to protect the national life, no other application? The benefit of its application has been boldly claimed by the men who have honored the highest judicial positions the nation could bestow on intellect, learning and virtue. It has protected the one from the hostile action of the many. May not its protection also be invoked to secure the many from an unauthorized exercise of power by the one? Is not the existence of the state governments as fully recognized in the Constitution of the United States as that of the national government? If the states may not exercise a power which might menace the general government, should not that hand also be held back from the throat of the former, though the pressure be at present ever so slight?"

"True, the national government is our government, and we will not anticipate an attempt by it at our destruction as a state, but, as the Chief Justice remarked in discussing this very question in *M'Culloch v. Maryland*, 'this is not a case of confidence.'"

As to the powers of the federal and state governments, we refer to the following authorities:

The states as independent sovereignties possessed prior to the creation of the general government what is known as inter-

nal police power, and that power was not surrendered to the general government, but is still retained by the states. Mr. Justice Story, in *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 625, says: "To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in any manner whatever to doubt or interfere with the police power belonging to the states in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States."

The police power of the states was very fully discussed by the Supreme Court of the United States, in *The City of New York v. Miln*, 11 Pet. 139, wherein it is said: "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions; they are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That by virtue of this, it is not only the right, but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

"If we were to attempt a definition, we should say, that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it; whether it relate to their rights, or their duties; whether it

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respected them as men, or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons, or property, of the whole people of a state or of any individual within it, and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction. But we will endeavor to illustrate our meaning rather by exemplification than by definition. No one will deny that a state has a right to punish any individual found within its jurisdiction, who shall have committed an offence within its jurisdiction against its criminal laws. We speak not here of foreign ambassadors, as to whom the doctrines of public law apply. We suppose it to be equally clear, that a state has as much right to guard, by anticipation, against the commission of an offence against its laws, as to inflict punishment upon an offender after it shall have been committed. The right to punish or prevent crime does in no degree depend upon the citizenship of the party who is obnoxious to the law. The alien who shall just have set his foot upon the soil of the state, is just as subject to the operation of the law as one who is a native citizen."

There can be no doubt that Congress possesses the power to determine who may, or may not, make contracts, and prescribe the manner of their enforcement, in the District of Columbia, and in all other places where the federal government has exclusive jurisdiction; but we deny the power and authority of Congress to determine who shall make contracts or the manner of enforcing them in the several states. Nor is there any doubt that Congress may provide for the punishment of those who violate the laws of Congress; but we utterly deny the power of Congress to regulate, control, or in any manner to interfere with the states in determining what shall constitute crimes against the laws of the state, or the manner or extent of the punishment of persons charged and convicted with the violation of the criminal laws of a sovereign state. In this State marriage is treated as a civil contract, but it is more than a mere civil contract. It is a

public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness, and well-being of society. In fact, society could not exist without the institution of marriage, for upon it all the social and domestic relations are based. The right, in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the states suffer or permit any interference therewith. If the federal government can determine who may marry in a state, there is no limit to its power. [It can legislate upon all subjects connected with, or growing out of this relation. It can determine the rights, duties, and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise, and absorb all the powers of a local and domestic character. This would result in the destruction of the states. The federal government cannot exist without the states, but the states could exist without the federal government, as they did before its creation. There is no necessity for the destruction of either. The authority of the federal government begins where the authority of the state ceases. The state government controls all matters of a local and domestic character. The federal government regulates matters between the states and with foreign governments. There is, and can be no conflict between the state and federal governments, if each will act within the sphere assigned to each. The necessity for states and local self-government is shown by the character of our people. The customs, habits, and thoughts of the people in one state differ widely from those of the people in another state, and this results in different laws.

The laws of this state provide that males of the age of seventeen, and females of the age of fourteen years, not within the prohibited degrees of consanguinity, are capable of entering into the contract of marriage. The statute provides that the following marriages are void: when one of

the parties is a white person, and the other possessed of one-eighth or more of negro blood; and when either party is insane or idiotic, at the time of the marriage. Under the police power possessed by the states, they undoubtedly have the power to pass such laws. The people of this State have declared that they are opposed to the intermixture of races and all amalgamation. If the people of other states desire to permit a corruption of blood, and a mixture of races, they have the power to adopt such a policy. When the legislature of the State shall declare such policy by positive enactment, we will enforce it, but until thus required we shall not give such policy our sanction.

This subject is discussed with great ability, clearness, and force, by the Supreme Court of Pennsylvania, in the recent case of *The Philadelphia and West Chester R. R. Co. v. Miles*, 2 Am. Law Rev. 358, wherein it said: "The right to separate, being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is whether there is such a difference between the white and black races within this State, resulting from nature, law, and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we do not know, but the fact is apparent, and the races are distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect, and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures, when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not neces-

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sary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman; that would be to draw the illogical sequence of inferiority from difference only. It is simply to say, that, following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but no less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

We fully concur in, and indorse the doctrine above enunciated. It is quite clear to us, that neither the fourteenth amendment nor the civil rights bill has impaired or abrogated the laws of this State on the subject of marriage of whites and negroes. The court erred in quashing the indictment.

The judgment is reversed, and the cause is remanded, with directions to the court below to overrule the motion to quash the indictment, and to place the appellee upon his trial for the crime charged in said indictment.

B. W. Hanna, Attorney General, and *W. P. Hargrave*, for the State.

A. L. Robinson, for appellee.

GRIFFITH v. THE STATE.

CRIMINAL LAW.—*Indictment.—Embezzlement and Grand Larceny.—Trial.*—

Where a defendant is indicted in separate counts in the same indictment for embezzlement and grand larceny, it is not error for the court to refuse to require the State to elect on which count he shall be tried.

SAME.—*Plea of Guilty.—Motion to Withdraw Plea.*—Where a plea of guilty had been accepted by the court, and sentence had been pronounced thereon; *Held*, that it was not error to refuse a request by the defendant to withdraw the plea, without any reason stated, made the next morning, and before the record of the proceedings was signed.

SAME.—*Plea of Guilty.—Confession.—Judgment.*—After a plea of guilty, or a confession of guilt in open court, no finding is necessary, but the judgment follows the plea or confession.

APPEAL from the Marion Criminal Court.

DOWNNEY, J. — The appellant was indicted, in separate counts in the same indictment, for embezzlement and grand larceny. In the count for embezzlement he was charged with embezzling one hundred dollars, the property of Richard T. Talbott, John P. Patterson, Joseph A. Moore, and William H. Morrison, on the 15th day of August, 1870. In the count for larceny he was charged with stealing one hundred dollars, the property of Richard T. Talbott, John P. Patterson, and William H. Morrison, on the 15th day of August, 1870. The defendant moved the court to require the State to elect upon which count of the indictment she would put him on trial, which motion the court overruled, and to which ruling the defendant excepted.

On being arraigned, the defendant pleaded that he was guilty, as charged in the indictment, and the court pronounced judgment against him of one dollar fine, and confinement in the state prison for two years. On the next day after the sentence had been thus pronounced, and before the minutes of the preceding day had been read and signed, the defendant, by counsel, in open court, asked leave to withdraw said plea, which was not allowed by the court, and he again excepted. It was not shown, or even stated to the

36	406
127	414
36	406
144	659
147	43
36	406
156	40
36	406
169	396
169	397

court, so far as anything appears, that the plea of guilty had been put in by the defendant through any mistake, surprise, or misapprehension of his rights or in relation to the facts of the case.

Three errors are assigned: first, the refusal of the court to compel the State to elect on which count she would try the defendant; second, the refusal to allow him to withdraw the plea of guilty; and third, the pronouncing judgment without a finding that the defendant was guilty, and specifying for which of the crimes he was sentenced.

It is urged by counsel for the appellant, that as embezzlement and larceny are distinct felonies, a count for each cannot be united in the same indictment. It is conceded that they are distinct crimes; but we cannot agree that the consequence contended for follows. We think it proper, where the felonies belong to the same class, and are so nearly alike as embezzlement and larceny, to allow the prosecutor to put into the indictment a count for each. This is but the exercise of a prudent foresight in anticipation of a possible variance in the evidence from the allegations of the indictment. Counts for larceny and receiving stolen goods, which are distinct felonies, are constantly united. So are counts for forgery and uttering the forged instrument, etc. Counts for wholly dissimilar felonies cannot be united, for the reason, we presume, that in this case the object would, at once, appear to be, to convict the defendant of separate and distinct crimes, under the same indictment, and which might tend to confuse him, and place him at a disadvantage in making his defence. But we deem further discussion of this question unnecessary, as it has been settled, we think, by former decisions of this court, against the appellant. *McGregor v. The State*, 16 Ind. 9; *Engleman v. The State*, 2 Ind. 91; *The State v. Smith*, 8 Blackf. 489; 1 Bishop Crim. Proc. secs. 180, 181.

Upon the question as to the correctness of the action of the court in refusing to allow the defendant to withdraw the

plea of guilty, our opinion is that there was no error committed. The court is backward in receiving and recording the plea of guilty from a prisoner, and will sometimes advise the prisoner to plead not guilty and put himself upon his trial. 2 Hale P. C. 225. But after the prisoner has pleaded guilty to the indictment, and his plea has been received, and the sentence of the court pronounced, we know of no authority for holding that, upon the naked request of his counsel, on a subsequent day of the term, the prisoner may withdraw his plea of guilty. The fact that the record is not read and signed by the judge until the next morning, does not make any change in our mind on this subject. The theory is that the acts of the court are reduced to writing by the clerk as the cause progresses. The object to be accomplished in reading the minutes on the next day is to ascertain that they have been correctly entered by the clerk. The parties cannot say that they are not bound by what has been done by the court, merely because the minutes have not yet been read and signed. The statute simply declares that "no process shall issue on any judgment or decree of the court until it shall have been so read and signed." 2 G. & H. 9, sec. 22. Had the defendant shown that by inadvertence or mistake he had pleaded guilty, the court would, doubtless, have retraced its steps, and allowed him to withdraw his former plea and plead otherwise to the indictment. 2 Bishop Crim. Proced. sec. 465. We do not say that the court might not have granted the request without any showing, or that it would have been error to have done so.

It is claimed that the judgment should be reversed, because the record does not show that the court found the defendant guilty. Upon a plea of guilty, or actual confession in open court, the court has nothing to do but to fix the amount of punishment and render judgment or sentence accordingly. There is nothing for the court to find. The prisoner, by his confession, has made a finding unnecessary. The court may take the prisoner at his word, and proceed accordingly. Mr. Blackstone, in his Commentaries, says:

"The other incident to arraignments, exclusive of the plea, is the prisoner's actual confession of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment." 4 Bl. Com. 329. In the case under consideration, as we have seen, the defendant confessed that he was guilty, as charged in the indictment; that is, that he was guilty of the embezzlement and larceny charged in the indictment, not of one or the other, but of both. There remained no uncertainty as to what it was of which he was guilty.

The punishment for embezzlement, as prescribed by statute, is a fine of not less than one, nor more than five hundred dollars, and imprisonment at hard labor in the state prison, not less than two nor more than twenty years; that for grand larceny is a fine of not exceeding double the value of the goods stolen, imprisonment in the state prison not less than two nor more than fourteen years, and disfranchisement and incapacity to hold any office of trust or profit for any determinate period.

The sentence of the defendant in this case was that he pay a fine of one dollar and be imprisoned in the state prison for the term of two years. Nothing having been said about the disfranchisement of the defendant, and his being rendered incapable of holding any office of trust or profit for any period of time, which is an indispensable part of the punishment for grand larceny, it would seem to be reasonably certain that the criminal court intended to sentence the defendant under the count for embezzlement, and not under that for larceny.

The court could not have intended to render one common judgment on both counts, punishing the defendant for both crimes, for the reason that the punishment imposed is no more than the minimum punishment for the crime of embezzlement. It is probable that the court might, upon the

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confession of the whole indictment, have rendered a separate judgment upon each count, against the defendant.

But in this, as in other cases, when two sentences of imprisonment in the state prison are pronounced against the same person, his time as to both would be going on at the same time, and he would be entitled to his discharge at the end of the longest term. *Miller v. Allen*, 11 Ind. 389. It will hardly be contended, we presume, that the prisoner can successfully object that the punishment imposed was less than might legally have been inflicted. It is probable that the learned judge of the criminal court regarded the counts of the indictment as based on the same transaction, and that, losing sight of the count for larceny, he sentenced the defendant alone on the count for embezzlement. The judgment was fully justified by the indictment and the confession of the defendant, and we cannot disturb it. 1 Bishop Crim. Proced. secs. 857, 858, *et. seq.*

The judgment is affirmed, with costs.

PETTIT, J. (dissenting)—The indictment against the appellants contained two counts, one for embezzlement and one for grand larceny. On being arraigned, the defendant demanded that the state should be required to elect upon which count the trial should proceed. This request was overruled and proper exception taken. The record shows the following, after the appearance of the parties: "And (the defendant) being arraigned upon the above indictment, for plea thereto says that he is guilty as charged therein. It is therefore considered that the defendant for the offence by him above committed do make his fine unto the State of Indiana in the sum of one dollar, and that he be confined in the state prison for a term of two years, and that he pay the costs of this prosecution."

Before the minutes were signed by the judge, the defendant moved the court for leave to withdraw his plea of guilty, which motion was overruled; and the defendant excepted to this ruling. There was no finding that the defendant was

guilty as charged, or that he was guilty of embezzlement and grand larceny, or either of them, but only a judgment that he be fined and imprisoned in, etc.

First. Should the court have allowed the defendant to withdraw his plea of guilty? The right of trial by jury is secured by the constitution of the State, and this right is inviolate and inviolable until the defendant has waived it of record, so as that the record shall become of binding force, and so as to operate as an estoppel; and this cannot be so until the minutes are read in open court and signed by the judge. Until these are done, the minutes may be said to be in solution, not solid, unsettled, and not of binding force as a record, and a party's rights are not precluded or settled thereby; hence the defendant had a right to withdraw his plea of guilty and plead not guilty and demand a jury trial.

In this case it was imperative on the court to allow the withdrawal, because the plea did not specify the count to which it was intended to apply. The indictment charged two distinct offences or felonies in separate counts, and to give to the plea such certainty as would authorize a judgment, it should have stated the offence of which defendant confessed his guilt; and the court should have found him guilty of that offence, and rendered judgment on the finding. The accused confessed himself guilty of embezzlement or larceny, and the judgment fails to ascertain the crime for which the party is convicted. This court, in an able and thoroughly considered opinion, and again on petition for rehearing, has held that larceny and embezzlement are distinct offences, and that the act creating and providing for the punishment of the latter was intended to punish as a crime that which was not by our law before punishable. *Smith v. The State*, 28 Ind. 321.

The punishments of the two offences are widely different. The conviction on a charge of larceny could not authorize a judgment for embezzlement, nor a conviction on a charge of embezzlement warrant a judgment for larceny. Upon the indictment and plea there was no basis upon which the court could legally fix the measure of punishment. It was

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as if no plea of any kind had been put in, and the court should have ordered, on its own motion, a plea of not guilty entered, as provided by statute. 2 G. & H. 413, sec. 98. This plea could have no greater force than a verdict of a jury in the same form, and surely it cannot be contended that the court could have rendered judgment on a verdict in this case which might have been returned in this form: "We, the jury, find the defendant guilty as charged in the indictment."

Our code must govern our criminal practice, instead of precedents in other states or in England.

I have already noticed the double character of the indictment; but I will proceed to examine it in relation to the joinder of distinct felonies in the same indictment, and whether the motion to require the prosecution to elect upon which count he would go to trial should have been sustained.

Our code, 2 G. & H. 405, sec. 72, provides, that upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty, as to the degree charged, and guilty of any degree inferior thereto, or of an attempt to commit the offence.

Section 73, 406, provides that in all other cases the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged.

Section 74, 406, provides that counts for murder in the first and second degree and for manslaughter may be joined in the same indictment, and on the trial the defendant may be convicted of either offence.

These are the only provisions that relate to the joinder of counts in an indictment, and they are only express enactments of what was held and practiced before the code, and they were intended to cover our whole law on the subject, but they do not authorize the joinder of counts charging distinct felonies.

In England and in some of the states, it is held under their

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statutes that counts for these two offences may be joined, but in every instance where these rulings have been made, the statutes defining embezzlement either declare it should be deemed larceny and punished accordingly, or that it should be punished as larceny. Not so with our act in relation to embezzlement. It fixes a different penalty from that prescribed for larceny, and expressly enacts that there was not at the time of its passage, December 21st, 1865, any law punishing the offence of embezzlement. 3 Ind. Stat. 256.

If these counts may be joined and the defendant compelled to go to trial on both, why not join counts for perjury and larceny, and indeed, counts for all the crimes and offences known to our law, and compel the defendant to go to trial on them? It seems too plain to require or admit of further discussion. Reference to all the statutes on this subject, both English and American, may be found in 2 Archbold's Criminal Practice and Pleading, 560.

I think that the court erred in not requiring the prosecutor to elect on which count he would put the defendant on trial, and in not allowing the defendant to withdraw his plea of guilty, and in rendering the judgment on the plea without a finding of guilty.

J. Hughes, S. A. Huff, S. E. Perkins, F. J. Mattler and S. E. Perkins, Jr., for appellant.

B. W. Hanna, Attorney General, J. S. Duncan, H. C. Guffin, and *J. R. Carnahan,* for the State.

HASHEAGEN v. SPECKER and Others.

HUSBAND AND WIFE.—*Wife's Separate Real Estate.—Contract.*—Certain goods were sold and delivered to a married woman, doing business in her own name and right, with her own separate estate, and with the consent of her husband,

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and owning in her own right certain real property; and suit was brought against her to charge her estate with the value of said goods.

Held, that as there was no averment of an intent on the part of the married woman to contract with regard to her separate estate, or create a charge upon the income of her separate real estate, the action could not be sustained.

APPEAL from the Ripley Circuit Court.

BUSKIRK, J.—The record in this case is voluminous, the briefs are long, many errors have been assigned, a great variety of questions have been discussed with marked ability; but there is one leading and important question presented by the record which must be decisive of the case. That question arises upon the amended complaint, the third paragraph of the answer, the instruction of the court, the general and special verdicts, and the judgment of the court.

The amended complaint is in these words:

“For second and further cause of action, plaintiffs complaining say, that the defendant Clara Hasheagen, a married woman, doing business in her own name and in her own right, merchandising with her own separate estate, with the consent of her husband and co-defendant, John Hasheagen, is indebted to the plaintiffs in the sum of four hundred and sixty dollars and eighty-seven cents, for goods and merchandise sold and delivered by plaintiffs to said defendant Clara Hasheagen, which said goods and merchandise were of the value of four hundred and sixty dollars and eight-seven cents, as set forth in a bill of particulars filed herewith, and for which the note filed herewith, marked exhibit ‘A,’ was given, leaving due and unpaid the sum of four hundred and sixty dollars and eighty-seven cents, together with the interest thereon, and that said Clara Hasheagen has an estate of her own and in her own right of the value of three thousand dollars, which is more particularly described in exhibit ‘B’ filed herewith and made a part hereof; and the plaintiffs demand payment for five hundred dollars, and for all other relief, and that the said indebtedness be made a charge on the estate of said Clara Hasheagen.”

There was filed with this paragraph a bill of particulars.

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The note referred to as exhibit "A" was in these words :
"\$460.87. CINCINNATI, April 10th, 1868.

Sixty days after date we promise to pay to the order of J. B. Specker & Co. four hundred and sixty dollars and eighty-seven cents, with ten per cent. interest from date, value received.

[25 cent stamp.]

JOHN HASHEAGEN.

Of SUMMERVILLE, Ripley Co., Ind. CLARA HASHEAGEN."

Exhibit "B" contained a description of the lots and land owned by the said Clara Hasheagen.

This action was originally based upon the above note, and was brought against both John and Clara Hasheagen, but the plaintiffs dismissed as to such first paragraph of complaint.

The court overruled a demurrer to the second paragraph of the complaint, and the appellant excepted.

The third paragraph of the answer of the appellant was in these words: "And for further answer to the second paragraph of said complaint, defendant Clara Hasheagen says, that at the time of the purchase and delivery of the goods described in plaintiffs' complaint, and also at the time of the execution of the note in the said complaint set out, she was and still is the wife of her co-defendant, John Hasheagen, and that the said goods were purchased by defendant John Hasheagen for his own use, and that she signed said note as security for her said husband, and not otherwise. Wherefore she demands judgment," etc.

To this paragraph of the answer the court sustained a demurrer, and the appellant excepted.

The instruction of the court was as follows: "This is an action to recover for an account which the plaintiffs claim is due them for goods, wares, and merchandise, as per bill of particulars filed with the complaint, which they claim were sold to the defendant Clara upon her own credit, with the consent of her husband. If you find from the evidence that the goods were sold and delivered to Clara on her own credit and with the consent of her husband, and you further find that

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she has a separate estate, then you should find for the plaintiffs for the amount due therefor. But if you should find that the credit was not given to her, or should find that her husband did not give his consent to the purchase, or that she has no separate property, then your finding should be for the defendant."

The general verdict of the jury was as follows: "We the jury find for the plaintiffs, and assess their damages at four hundred and sixty dollars and eighty-seven cents. We further find that the defendant Clara Hasheagen is the owner in her own right of the following estate." Then follows a description of certain town lots and real estate.

The jury also returned answers to interrogatories as follows:

1. "Were the goods set out in the bill of particulars purchased of plaintiffs by defendants, or either of them?" Answer. "Yes."

2. "If purchased by one of the defendants, which defendant purchased the goods?" Answer. "Clara Hasheagen."

3. "On whose credit were the goods purchased?" Answer. "Clara Hasheagen's."

4. "What was the value of the goods so sold, and what was the date of the sale?" Answer. "Five hundred dollars and eighty-seven cents. April 10th, 1868."

5. "Was defendant Clara Hasheagen, at the time of the purchase of these goods, doing business as a merchant, in her own name, and with her own means, with the consent of her husband?" Answer. "Yes."

6. "What separate estate has Clara Hasheagen, if any?" Answer. "Lots 11, 12, 26, 27, 28, 34, 65, 94, 95, 113, 114, 115, and 116, in the town of Summerville, Ripley county, Indiana; also south-west quarter of south-west quarter of section 29, town 10, north of range 13 east, containing forty acres, in said county."

7. "Did Clara Hasheagen purchase the goods set out in the complaint, in her own right, and with the knowledge and consent of her husband?" Answer. "Yes."

The court overruled motions for a new trial, and in arrest

of judgment, over objection and exception of the appellant, and rendered final judgments in these words:

"It is therefore considered by the court that the plaintiffs recover the sum of four hundred and sixty dollars and eighty-seven cents, and also their costs and charges in this behalf laid out and expended, taxed at —.

"It is further ordered and adjudged by the court, that the following described real estate, in Ripley county, State of Indiana, to wit: lots numbered 11, 12, 26, 27, 28, 34, 65, 94, 95, 113, 114, 115, and 116, in the town of Summerville, also, the south-west quarter of the south-west quarter of section twenty-nine, town ten, north of range thirteen east, is liable, as the separate estate of the said defendant, Clara Hasheagen, to the payment of said judgment, interest and costs, and that the same be sold, or so much thereof as may be necessary, upon an order of sale to be issued herein, as other lands are sold on execution, to satisfy the same."

We do not deem it necessary to dispose of the errors assigned in detail, and in the order in which they are assigned. The question of the liability of the appellant is fairly and fully presented by that portion of the record which we have set out in this opinion, and as the decision of that question will be decisive of the case, we will not consider any other question in the cause.

Did the facts stated in the second paragraph of the complaint create a legal liability against the appellant? What are the facts stated? They are these. First, Clara Hash-eagen was a married woman doing business in her own name and right, with her own separate estate, and with the consent of her husband. Second, that she was indebted to the plaintiffs, in the sum of four hundred and sixty dollars and eighty-seven cents, for goods, wares, and merchandise, by them sold and delivered to her. Third, that she owned in her own right, and held as her separate property, certain described real estate, of the value of three thousand dollars.

The prayer of the complaint was for judgment, and that

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said indebtedness should be made a charge upon the estate of the said Clara Hasheagen.

We do not propose to enter upon a general discussion of the legal rights of married women or of their power to encumber their separate estates. These questions were discussed with great thoroughness and marked ability by this court, in the case of *Kantrowitz v. Prather*, 31 Ind. 92, where the leading English and American authorities were reviewed, and certain propositions of law deduced therefrom.

The general rule is that the contracts of a married woman are void and cannot be enforced against her either at law or in equity.

But in this State the legislature has enacted, that "no lands of any married woman, shall be liable for the debts of her husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried: Provided, that such wife shall have no power to incumber or convey such lands, except by deed, in which her husband shall join." 1 G. & H. 374, sec. 5.

By the above provision, the clear and undoubted power is given to a married woman to encumber her separate real estate, by mortgage, if her husband joins with her; and this she may do, although the contract has no reference to her separate lands. This court has held that she may even become the security of her husband, and may by mortgage encumber her lands to secure the payment of the debt for which she had become security. *Brooks v. Berryhill*, 20 Ind. 97; *Hubble v. Wright*, 23 Ind. 322.

It was held by this court, in *Smith v. Howe*, 31 Ind. 233, that the purpose of the legislature in conferring upon married women the right to hold property, in certain instances, was, in those cases, to vest in a married woman more complete control of her separate property, and its proceeds, than she possessed at common law; but that it was not the legislative intention to abrogate or control any right or power that she possessed at the time of the passage of such statutes, in reference to the management of such property.

The following propositions of law were enunciated by this court in the well considered case of *Kantrowitz v. Prather*, *supra*:

"In this State, in order to enforce the contract of a married woman against her separate real estate, her intent to deal with the property must appear, and may not be assumed, and the contract must be one from which benefit results to the property.

"So far as the profits of a married woman's real estate are concerned, effect will be given to her contracts where she has indicated her purpose to deal with such profits.

"It must appear that any contract relating to the property of a married woman, which it is sought to enforce in equity, is conscionable, and where it relates to the betterment of her real estate, that it is reasonably calculated to promote that end.

"The fact that credit for goods sold to a married woman is given her upon faith of her separate property, is not sufficient to create a charge against her land or its income; she must also herself intend to contract with regard to her separate estate."

We regard these principles as sound and correct; and when applied to the case under consideration, they must be decisive of it. The complaint in this case does not charge the wife with any intent to contract with regard to her separate estate; nor does it allege that she had indicated any purpose to create a charge upon the income of her separate real estate.

Considerable stress has been laid in argument upon the facts that Mrs. Hasheagen was engaged in business as a merchant, in her own name, with her separate means, and with the consent of her husband. We are unable to see how the facts above stated could create a personal liability against her or charge her separate real estate or its income.

We have no statute in this State, as there is in New York and several of the other states, authorizing a married woman, upon certain conditions, to carry on business as a trader or merchant, and fixing her liability for debts contracted in

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reference to such business. Decisions made under such a statute can have no application or force in this State.

We are of the opinion that the court erred in overruling the demurrer to the complaint, and in sustaining it to the third paragraph of the answer.

We are also of the opinion that the court erred in overruling the motion for a new trial, and in rendering judgment upon the general and special verdicts.

The judgment is reversed, with costs; and the cause is remanded with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

W. D. Willson and T. E. Willson, for appellant.

E. P. Ferris and H. T. Lipperd, for appellees.

BLACK *v.* ROGERS and Wife.

MECHANIC'S LIEN.—*Married Woman.*—*Separate Property.*—A complaint to enforce a mechanic's lien alleged that the defendants, husband and wife, were indebted to the plaintiff for work and labor done and materials furnished, as shown by a bill of particulars, in erecting a house on real estate belonging to the wife. Answer in denial, and plea of payment. Trial and finding for plaintiff. Motion in arrest of judgment by the wife sustained, and judgment in her favor.

Held, (DOWNEY, J., dissenting) that the averments of the complaint were not sufficient to charge the wife, but that all the particulars necessary to show the liability of the wife should have been expressly averred.

APPEAL from the Marion Common Pleas.

PER CURIAM.—Suit by the appellant against the appellees, husband and wife, to enforce a mechanic's lien for work done and materials furnished in the erection of a house on the separate property of the wife. Answer of general denial, and payment. Reply in denial of the payment. Trial by jury, verdict for plaintiff, motion for new trial overruled.

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Motion in arrest of judgment by the wife sustained, and judgment in her favor, and against the husband. Appeal by the plaintiff.

The reasons, in writing, for the arrest of judgment are: first, there are no averments in the pleadings of a contract by the said Emerine, with the said plaintiff, for the labor done and materials furnished, as alleged in the plaintiff's complaint; second, the pleadings show no interest on the part of said Emerine, to bind her separate property for the work done and materials furnished as alleged in the complaint; third, there is no averment that the house mentioned in the complaint, upon which the work was done, and for which the materials were furnished was necessary and proper for a full and complete enjoyment by the said Emerine of the real estate mentioned in the complaint.

The only error assigned is the action of the court in thus arresting the judgment.

The complaint alleges, that "George H. Black, plaintiff, complains of Benjamin F. Rogers and Emerine Rogers, his wife, and says that the defendants are indebted to the plaintiff in the sum of three hundred and fifty-six dollars and eighty-seven cents, for work and labor done and materials furnished, as shown by a bill of particulars filed with and made part hereof, marked 'A.'" That the work and labor was done upon, and said materials furnished for and used in the erection of a house on lots numbered, etc.; that said lots are the separate property of the defendant Emerine, and were so owned by her at the time said work was performed and materials furnished, etc.; the recording of notice, etc.

It will be seen that this complaint does not undertake to set out the particulars of the contract. It simply alleges an indebtedness of the defendants to the plaintiff for the work and materials.

A majority of the court are of the opinion that this is not sufficient, but think the complaint should have shown, by express allegations, all the facts necessary to show the liability of the wife; and they refer to *Kantrowitz v. Prather*, 31

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Ind. 92, and *Lindley v. Cross*, 31 Ind. 106. Hence they are of the opinion that the action of the court in arresting the judgment was correct.

The judgment is affirmed, with costs.

DOWNEY, J.—I do not agree with my brethren in their conclusion in this case. I am of the opinion that whatever evidence was necessary to show a valid indebtedness on the part of the defendants was admissible under the complaint. If the pleader had attempted to set out the facts from which it was claimed that the indebtedness arose, it would have been necessary to set out all that was essential to warrant such inference. But, conceding that it was necessary, in order to show an indebtedness on the part of the wife, to show that she made the contract for the work and materials; that it was with the assent of her husband; and that the improvement was necessary and proper for the better enjoyment of her estate, as held in the cases relied upon by the majority of the court, I think that all these facts might have been, and probably were, shown under the general allegation of indebtedness in the complaint. Whatever was necessary to justify the verdict of the jury was properly admitted under the complaint, and the presumption is, that the necessary proof to warrant the finding was made. I think the general verdict for the plaintiff settled the question of the wife's liability to the plaintiff for the work and materials, and that the common pleas, instead of arresting the judgment, should have rendered a judgment for the enforcement of the lien.

V. Carter, for appellant.

G. K. Perrin and J. P. Baker, for appellees.

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EMBREE, Receiver of the Home Insurance Co., v. SHIDELER.

MUTUAL INSURANCE COMPANY.—Receiver.—Assessment.—An action by a receiver of an insolvent mutual insurance company, to collect an assessment on a premium note, cannot be sustained where the complaint shows on its face that neither the receiver nor the court to which he reports his action has examined and determined upon the validity of the claims against the company, for the payment of which the assessment is made. The amount of claims which the receiver or the court will allow as just demands against the company, together with any indebtedness previously allowed by the directors of the company, as shown by their books, must be ascertained, before an assessment can be made to pay such indebtedness.

SAME.—Assessment.—Complaint.—The complaint to collect an assessment upon a premium note given to a mutual insurance company must show the time covered by the policy for which the note was given, and that the losses for which the assessment was made occurred during the existence of the policy.

APPEAL from the Dearborn Common Pleas.

DOWNEY, J.—The only error assigned in this case is the action of the court in sustaining the demurrer to the complaint.

The action was brought by the appellant against the appellee on the following instrument:

"\$120.00. For value received in policy No. 5,626, dated the 9th day of December, 1865, issued by the Home Insurance Company, of Lafayette, Indiana, I promise to pay to the said company the sum of one hundred and twenty dollars, in such portions, and at such times, as the directors of said company may, agreeably to their by-laws, require, to pay the losses and expenses, as prescribed by the laws of this State, without any relief from valuation or appraisement laws.

REV. ANTHONY SHIDELER, Pastor."

The complaint alleges the making of this note; that at the April term, 1868, of the Tippecanoe Circuit Court, the plaintiff was appointed receiver of the company; that at the October term, 1868, he presented to the court a statement, showing, among other things not necessary to be here noticed, that assets of the company had come to his hands as follows:

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Premium notes.....	\$64,401.88
Cash notes due and to become due, about.....	4,138.00
Notes due in annual instalments, about.....	4,000.00
Furniture, about.....	125.00
Money received by him.....	321.72
Total	<u>\$72,986.60</u>

Stating the liabilities of the company at.....\$22,642.87

The table of liabilities is made up mostly of alleged losses. But he reported as follows: "This amount includes all the claims that have come to my knowledge; the situation of the company's affairs, together with the labor necessary to make this report at all intelligible, and the work of preparing an assessment book, have so absorbed my time, that I have examined no claim with particular reference to its validity, and as a matter of necessity I have seen fit to report all here. I have no doubt that some are invalid, and should not be paid, and will give them all necessary and proper attention hereafter, either under the suggestion of this court or otherwise." Of the whole amount of assets he thought the only notes certainly available were those subject to assessment. Something, he thought, might be made out of the cash notes, but the amount would be small, as was evident from past experience. He asked the court, on account of the claims reported by him, "and as it may be expected that other losses will yet occur to increase the amount of liability, together with the costs and expenses of collecting the assessment, and closing up the affairs," that an assessment of fifty per cent. be ordered upon said premium notes, amounting to the sum of \$32,200.94, to be collected without delay. This statement was sworn to by the receiver. The court ordered the receiver to levy the assessment of fifty per cent. In the April term, 1869, he again reported, under oath, showing an addition to the claims, by losses and otherwise, of \$8,832.25. In this report he says: "These last claims, as well as those reported heretofore, have not been fully examined with reference to their validity, but will be

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as soon as the other and more important work has been done." He also reported that he had made the assessment of fifty per cent. authorized by the preceding order. He had collected \$363.22 from assessments and otherwise, which with the \$321.72 in his hands at last report, is \$684.94. Of this he had paid out \$448.91, all apparently for expenses. All of which he claims that he had accomplished by his own labors and the help of a clerk for three months. He asked, and the court granted him an allowance of fifteen hundred dollars for his services thus far. At the October term, 1869, he again reported, under oath, stating that the total amount of losses and claims filed against the company are now.....\$32,074.12
Amount of losses of which I have had notice, but
which are not yet reported, about..... 1,200.00

Total\$33,274.12
Total amount of assets, about.....\$72,664.88
Amount considered almost entirely
worthless 8,138.00
Balance.....\$64,526.88
Amount of notes subject to assessment..... 63,893.20

He further stated, "of the whole amount of assets, as has heretofore been reported, the receiver thinks that none are available but the premium notes, and of them, at least one-third are worthless, if not a greater proportion; besides, the collection of them is found to be very tedious and expensive." In view of all which he asked the court that an assessment might be made of all the unpaid balances of the several premium notes in his possession. This request was granted, and the assessment ordered. It is alleged that notice of the assessment was sent to the defendant at his post office.

There is no allegation in the complaint that the note on which the suit is brought is one of the notes which went into the hands of the receiver, nor that any policy ever issued, except what is said about it in the note. Nor is it

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anywhere shown for what time the policy was to run, or that any of the claims spoken of accrued while the defendant held the policy.

The statute law of this State is very meager on the subject of the rights, powers, and duties of receivers. We have not been referred to any provision of the statute, and have not found any, authorizing the receiver of a mutual insurance company to make assessments on the premium notes. There seems, however, to be a necessity for his doing so, and hence the authority may reasonably be implied. Without such a power it would not be possible for a receiver of such a corporation to manage its affairs.

Notes of this description are not payable unconditionally, and at all events. It is provided by statute, that "every person who shall become a member of such company shall, before he receives his policy, deposit his promissory note as a premium note, for such sum as may be agreed upon, on which note he shall pay not less than five per cent. immediately upon its delivery, and the balance of such note shall be payable in part or in whole, when, on any assessment made, the directors shall require the same." 1 G. & H. 395, sec. 45.

The next section provides, that "the funds of every such corporation shall be invested in stocks, or loaned on security, as the directors may order, and shall be appropriated, first, to pay the expenses of the corporation, and then to pay the damages which any member may be entitled to recover in his policy; and if any member shall have a just claim on the corporation, founded on a policy issued by them, exceeding the amount of their then existing funds, exclusive of deposit notes given by the members, the directors shall forthwith assess such sum as may be necessary to pay the same, upon the members, in proportion to the amount of their premiums and deposits severally for seven years; but no member shall be liable to pay in the whole more than the amount of his premium and deposit note."

The next section is as follows: "Before the company shall

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make any assessment on the premium notes for alleged losses, the president and a majority of the directors shall make a statement verified by their oath, exhibiting the amount and nature of the loss sustained; of cash means and premium notes on hand, and the gross amount of the assessment proposed to be levied."

Taking it as granted that the receiver succeeds to the place and powers of the directors under these sections of the statute, what is it necessary for him to do in order to put himself in a position to maintain an action against a member on his premium note?

He must ascertain that a member, that is, one holding a policy of insurance in the company, has "a just claim on the corporation founded on a policy issued by them, exceeding the amount of their then existing funds, exclusive of deposit notes given by the members."

It is evident from the facts shown in the complaint, that there has been an utter and total failure on the part of the receiver to perform this duty. On the contrary, he expressly states in his first report that he has "examined no claim with particular reference to its validity," etc.; and in his next report, "that these last claims, as well as those reported heretofore, have not been examined with reference to their validity, but will be as soon as other and more important work has been done."

What the "more important work" was, when he was about to ask the authority of the court to make an assessment expressly to pay the losses, we cannot imagine. For anything appearing in the complaint and accompanying documents, not one thousand dollars out of the whole amount of claims mentioned may be justly and honestly due from the corporation. But it is claimed that the action of the Tippecanoe Circuit Court is conclusive upon the defendant in this action. We think this may be correct, so far as the action of the court in the appointment of the receiver is concerned, and possibly it might be as to the existence and justness of the claims against the company, and the regularity

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of the assessments, if the court had been requested to pass, and had passed upon these questions. But as the authorities on the point are few and not uniform, and it is not necessary that we should do so in this case, we do not decide the question. It is enough to say that neither the receiver nor the court is shown to have examined the claims and found them to be "just claims on the corporation," as required by the statute. The first assessment seems to us to have been quite large. The premium notes amounted to sixty-four thousand four hundred and one dollars and eighty-eight cents.

Fifty per cent of this amount is.....	\$32,200.94
The claims, none of which had been examined by the receiver "with particular reference to their validity".....	22,642.87

Leaving a surplus of..... \$9,558.07

Without collecting this assessment so far as is shown, or showing that it could not be collected, on a representation to the court that "the total amount of losses and claims filed against the company are now thirty-two thousand and seventy-four dollars and twelve cents," and others of which he had received notice but which were not yet reported, about one thousand two hundred dollars, making in all thirty-three thousand two hundred and seventy-four dollars and twelve cents, the court ordered or approved an assessment of the whole amount of the balances due on the premium notes.

We need not decide whether this assessment was excessive and therefore invalid or not; but see on this subject the cases hereinafter cited.

The record of the proceedings in the Tippecanoe Circuit Court being made part of the complaint, and it appearing conclusively therefrom, that the court did not pass upon the correctness of the claims against the company, and the receiver admitting that he had not done so, we think the assessments cannot be sustained.

While on this subject we may as well note some of the

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cases which we have come across in our hunt for authorities, which may be useful for future reference in this or other cases.

In New York, the receiver is expressly authorized, under the authority and sanction of the court appointing him, to make all such assessments on the premium notes belonging to the corporation as may be necessary to pay the debts of the corporation, as by the charter thereof the directors of the corporation have authority to make. The directors in making assessments do not act judicially. The assessment must be upon the notes of all those who were members of the company at the time of the loss, whether they had been members for a longer or a shorter time. If the directors omit any persons liable to be assessed, or include the amount of previous assessments, from the payment of which the parties assessed have been released, the assessment is invalid. *Herkimer, etc., Ins. Co. v. Fuller*, 14 Barb. 373.

A member of a mutual insurance company is not liable to assessments upon his premium note, to meet deficiencies of means arising from a failure to collect of other solvent members. When a member has paid towards any loss or expenses, in proportion to the amount which his deposit note bears to the other deposit notes, legally assessable, his liability to assessment in respect to such loss or expenses is discharged. He cannot be assessed beyond such proportion, without a violation of the charter of the corporation; and no such assessment, either by the directors or by a receiver duly appointed by the court upon such corporation becoming insolvent, can be upheld. A receiver of an insolvent mutual insurance company cannot legally assess any person insured therein, beyond his proportion of the losses; and he is bound to allow, toward the proportion of members, what they have paid on former assessments, for the same losses, etc., whether void or valid. *In re Bangs*, 15 Barb. 264.

The receiver is substituted in the place of the directors in respect to the liability of the members on their premium notes, and is vested with their rights and powers. He may

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collect whatever amount the directors might have collected, and in the same manner. But he cannot, without making an assessment, collect the whole amount of the notes. It was not intended that those who should become members of mutual insurance companies, by giving their deposit notes, should be held liable, either to the company itself, or to a receiver, upon the insolvency of the company, for any greater amount than should be found necessary in order to provide the indemnity contemplated by this system of insurance; and for the purpose of determining the extent of such liability an assessment is necessary. The receiver of an insolvent corporation is to make separate assessments for the payment of the several losses for which the company is liable, upon all the premium notes in force at the time each successive loss has happened. Where several losses have occurred at the same time, or so nearly together that the same notes are liable to be assessed for the payment of them all, only one assessment is necessary. *Shaughnessy v. Rensselaer Ins. Co.*, 21 Barb. 605.

A receiver has the same power to make assessments and determine the time of payment which the directors had. But the appointment of the receiver does not determine the amount of the indebtedness of a member or the time of payment. Until the receiver has made an assessment and given notice thereof, he cannot maintain an action. *Williams v. Babcock*, 25 Barb. 109.

Assessment or apportionment is a condition precedent, necessary to be averred in the complaint, and proved on the trial. An order of the court directing the receiver to prosecute and collect the whole amount unpaid on the deposit and premium notes, by any and all legal and proper ways and means, will not authorize the receiver to sue without having made an assessment. *Devendorf v. Beardsley*, 23 Barb. 656.

An assessment is not complete and consummated until it is ascertained, fixed, and determined, by carrying out upon the extension book the amount which each member is to pay. *Bangs v. McIntosh*, 23 Barb. 591.

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The receiver of a mutual insurance company, in making an assessment upon the premium notes held by the company, is the actor, and his authority depends not upon the order of the court, but upon the existence of the facts rendering an assessment necessary and proper. In ordering a receiver to make an assessment upon the premium notes, the courts do not adjudicate upon the liability of the company, or determine the amounts for which assessments shall be made, or the ratio of assessment. They merely sanction and authorize the acts of the receiver, who acts ministerially, not judicially. The assessment is the act of the receiver, and in and with him is the authority to act in the premises. The promise of the assured is to pay upon certain conditions, and the existence of those conditions must be shown by the party seeking to enforce the contract. The directors of a company, or the receiver, if one be appointed, have no arbitrary discretion in making an assessment, but they are controlled by the explicit provisions of the statute, and must by proper averments and proof bring themselves within the terms of those provisions before they can enforce the collection of the premium note. Where there was no averment in the complaint, and therefore no foundation laid for the introduction of evidence of the liabilities of the company, and there was no proof of the existence of any liabilities for the payment of which an assessment was necessary, the plaintiff could not recover. *Thomas v. Whallon*, 31 Barb. 172.

All that a receiver is required to show, in a suit by him on the premium note, is, that sufficient claims for losses had been presented to the company, or to him, which he allowed, to make up the sum for which he assessed the note. He need not prove all the facts, upon which he or the company allowed the losses. The company, or when insolvent, its receiver, acts for the members, in receiving and allowing claims for losses, and the determinations of the company, or its receiver, in allowing such claims, are *prima facie* binding upon its members. *Sands v. Hill*, 42 Barb. 651.

The assessment of a premium note is but the performance

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of a ministerial duty, and is therefore not final. *Sands v. Sweet*, 44 Barb. 108.

An assessment is a necessary condition to the maintenance of an action by the receiver of a mutual insurance company, upon a premium note, where the charter and by-laws do not otherwise provide. The insolvency of the company does not enable the receiver to recover under circumstances in which the company could not have maintained a suit, nor to any greater amount. *Savage v. Medbury*, 19 N. Y. 32.

An assessment in form need not specify the name of the party bound to contribute, nor the amount of the note. A general assessment is good by which the receiver declares that each premium note is assessed to the full amount thereof. When it appears to the receiver, from the liabilities of the company, and the times at which the liabilities accrued, and from an examination of all the classes and notes of the company, that there is no note that is not chargeable to its entire amount, for liabilities which justly attach during the existence of the policy accompanying such note, a general assessment upon all the notes, without regard to classes, and to their full amount is unobjectionable. *Sands v. Sanders*, 28 N. Y. 416.

In an action upon a premium note, it is incumbent upon the plaintiff to give some evidence of the existence of losses which render an assessment proper. Such evidence of loss and settlement and allowance of the same as would conclude the company, while engaged in its proper business, will be sufficient when the action is by a receiver. So a judgment against the company is sufficient evidence. It is unnecessary to show the particular loss for the payment of which the assessment is made. *Jackson v. Roberts*, 31 N. Y. 304.

When the assessments on some of the notes cannot be collected, on account of the inability of the makers to pay, the other members are liable to an assessment to pay the amounts which cannot, for this reason, be made. *Bangs v. Gray*, 2 Kern. 477; *Edwards on Receivers*, 296, *et seq.*

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The record of losses kept by a mutual insurance company is sufficient *prima facie* evidence that such losses have occurred, in an action to recover an assessment laid upon the members. A previous illegal assessment, not collected, is no defence against the collection of a legal and valid one. Slight disproportion in assessment will not render an assessment invalid. *People's Mut. Ins. Co. v. Allen*; 10 Gray, 297.

An assessment of a greater amount than is necessary to enable the company to meet existing just claims against it, together with a reasonable allowance for expenses and failures to make collections, is invalid; and an allowance for these purposes of a sum more than the whole amount of the deficiency in its funds is unreasonable, if no special circumstances are shown to justify the excess. *People's Equitable, etc. Ins. Co. v. Babbitt*, 7 Allen, 235.

Cash paid for premiums is subject to the same application as premium notes, and cannot be diverted to the payment of losses occurring before such premiums were received; and an assessment for the whole amount of losses occurring during the time such funds were received, made upon the deposit notes, without first exhausting the cash funds as provided by law, is illegal and void. *The Ohio Mutual Ins. Co. v. The Marietta Woolen Factory*, 3 Ohio St. 348.

In an action by a mutual insurance company against one of its members, upon his premium note, the defendant is an adversary party, and as such is not conclusively bound by the action of the board of directors, and is not bound to take notice of their proceedings in relation to his note. A premium note executed by a policy holder to a mutual insurance company promised to pay the sum therein named "in such portions and at such time or times as the directors of said company may, agreeably to their charter and by-laws, require;" by the charter, the premium notes and cash premiums composed the capital stock, and this capital was declared liable for losses and expenses. Held, that the company could not recover on the notes for an assessment

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made thereon without alleging and proving that losses and expenses had actually occurred. *The American Ins. Co. v. Schmidt*, 19 Iowa, 502.

An assessment is limited by the amount of the losses sustained and unpaid at the time of making the assessment. *The Sinnissippi Ins. Co. v. Taft*, 26 Ind. 240.

A refusal to pay an assessment made to cover the expenses of the company, as well as losses sustained, gives no right of action upon the premium note. *The Sinnissippi Ins. Co. v. Wheeler*, 26 Ind. 336.

If the assessment be excessive it is void, and an action will not lie to recover it. *The Sinnissippi Ins. Co. v. Farris*, 26 Ind. 342.

Where an insurance company is insolvent, or in imminent danger of insolvency, the court has the power to appoint a receiver for such company. If the facts in the complaint are sufficient to give the court jurisdiction of the subject-matter, and power to appoint a receiver, the proceeding, although erroneous, cannot be questioned in a collateral suit. The expenses of the suit, and the expenses of collecting the assessment, etc., are chargeable to the fund raised by the assessment. And if the assessment be for more than necessary, it cannot be objected to, if there be nothing in the judgment of the court authorizing a misapplication of the fund, because the surplus would be refunded to those from whom it was collected. The amount to be assessed is proper matter for the court to determine, and an error of judgment, in that respect, will not vitiate the assessment, or render it liable to be questioned collaterally. *Howard v. Whitman*, 29 Ind. 557. By citing this case we do not care to be understood as in all respects approving it. An assessment in excess of the amount necessary to pay losses, with the expenses of collecting the same, would seem, from the authorities, to be invalid. There would seem to be neither reason nor authority for collecting more than is necessary for these purposes.

A complaint on a premium note alleging that the assessment was made to pay losses and expenses is good, if the

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assessment filed with the complaint show that it was to pay losses only. *Bersch v. The Sinnissippi Ins. Co.*, 28 Ind. 64.

We think the complaint is defective, also, in that it does not show the time covered by the policy, and that the losses for which the alleged assessments were made occurred during that time. The law with reference to mutual insurance companies provides that the policy may be issued for a term not exceeding seven years. 1 G. & H. 395, sec. 42. It may, of course, then, be issued for any period less than seven years. The policy and the premium note constitute but one contract, according to a familiar principle of law, as they are executed at the same time, between the same parties, and relate to the same subject. One who executes a premium note is only liable to contribute to the payment of losses happening during the time for which his policy runs. It is expressly provided by the statute, that "every person insured by any such company shall be a member thereof as long as he shall be so insured." 1 G. & H. 395, sec. 44. The complaint not showing that the losses for which the alleged assessments were made occurred during the time that the defendant was a member, it is clearly defective. *Great Falls Mutual Fire Ins. Co. v. Harvey*, 45 N. H. 292.

Another question is made by appellee, and discussed, but we do not deem it necessary to examine it.

The judgment is affirmed, with costs.

PETTIT, J., dissents.

D. S. Major and Liddell, for appellant.

N. S. Givan, for appellee.

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THE BALTIMORE AND OHIO RAILROAD COMPANY v. McWHINNEY and Another.

RAILROAD.—Freight.—Demurrer.—Parties.—In an action to recover from a railroad company the value of flour delivered to a combination of railroad companies, which divided freights *pro rata* among themselves, according to the length of each road, of which combination the railroad company sued was a member, and received the flour when it reached the line of its road, and transported the same to its destination, and refused to deliver it on demand to the plaintiff;

Held, that a demurrer to the complaint for want of sufficient facts did not present the question whether the other railroad companies united with it in the receipt and transportation of the flour and freight generally, were partners and proper parties with it as defendants to the action.

SAME.—Bill of Lading.—Loss.—Value.—The bill of lading stipulated that "in the event of the loss of any property," etc., "the value or cost of the same at the point and time of the shipment is to govern," and that the company in such case was to have the benefit of any insurance on the property lost.

Held, that the delivery of the flour at the point of destination to a wrong person. was not a loss within the intent of the bill of lading, and the proof of value was not therefore limited to the point of shipment.

DEPOSITION.—Motion to Suppress.—When evidence may be introduced on the trial, which may make the answers to certain interrogatories in a deposition admissible, it is proper that a motion to suppress should not be decided, until on the trial the court is informed whether or not such evidence will be offered.

TRIAL.—Open and Close.—Where the plaintiff, under the issues, has anything to prove in the first instance, in order to entitle him to recover; or where he is required to prove his damages in cases where the damages cannot be ascertained by mere computation, he is entitled to open and close.

EVIDENCE.—Proof of Writing.—Where an agency is sought to be established, by means of a letter purporting to be written by a party to the action, the genuineness of the letter must be first shown.

APPEAL from the Wayne Common Pleas.

WORDEN, C. J.—Action by appellees against appellant.
Complaint in two paragraphs.

The first alleges, in substance, that the plaintiffs were partners doing business under the firm name and style of James McWhinney & Company; that on or about the 7th of June, 1864, the defendant was a corporation, owning and operating a line of railroad extending from a point on the

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Ohio river, opposite the town of Bellaire, Ohio, to the city of Washington, D. C., and was engaged as a common carrier in transporting goods over said road; that at said town of Bellaire said railroad connected with a railroad owned and operated by the Central Ohio Railroad Company, extending from said town to Columbus, Ohio, where it connected with certain other railroads owned and operated by certain railroad companies which had been united under the name of the Great Central Railway line, extending from Columbus, Ohio, to Indianapolis, Indiana; that an arrangement had been made between said defendant and said other railroad companies, whereby it was agreed that all goods received at any point on either of said roads for shipment to any point on either of the others should be transported by them respectively, the freight received therefor to be divided among said companies in proportion to the distance of transportation over each road; that on the day aforesaid the plaintiffs delivered to the agent of the companies composing the said Great Central Railway line, at their station at Richmond, Indiana, four hundred barrels of flour, to be transported to the city of Washington, D. C., there to be delivered to the plaintiffs by their firm name aforesaid, in care of Seth English, Washington, D. C., and the said Great Central Railway line, by their acting agent, then and there executed and delivered to the plaintiffs a bill of lading therefor, a copy of which is filed and made a part of the complaint; that said great Central Railway line did transport the flour over its road to the terminus thereof, Columbus, Ohio, and there delivered the same to the Central Ohio Railroad Company, who transported the same over its road to the terminus thereof, at Bellaire, and there delivered the same to the defendant, who then and there undertook to transport the same over her road according to said arrangement, and deliver the same to the plaintiffs at Washington, D. C.; that defendant did transport the flour to Washington city, and delivered one hundred barrels thereof to the plaintiffs, but did not deliver the residue thereof, viz., three hundred barrels, to the plaintiffs

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or to any person authorized by them to receive it; that the plaintiffs demanded the same, and were then and there willing to pay freight, etc.; but the defendant, instead of delivering the flour to the plaintiffs, wrongfully delivered the same to some other person or persons not authorized by the plaintiffs to receive it, whereby the same was lost to the plaintiffs, to their damage of five thousand five hundred dollars.

The bill of lading set out contains the following stipulation: "In the event of the loss of any property for which the carriers may be responsible under the bill of lading, the value or cost of the same at the point and time of shipment is to govern the settlement of the same; and in case of loss or damage of any of the goods named in this bill of lading, for which this company may be liable, it is agreed and understood that they may have the benefit of any insurance effected by or on account of the owner of said goods."

The second paragraph alleges that on and before the 7th of June, 1864, the defendant owned and operated a line of railroad extending from a point on the Ohio river, opposite the town of Bellaire, Ohio, to the city of Washington, D. C., and was then and there engaged as a common carrier in transporting goods and merchandise over said road; that on or about the day aforesaid, the plaintiffs, by and through the agency of the Central Ohio Railroad Company, delivered to defendant at Bellaire, Ohio, three hundred barrels of flour for shipment to Washington city, and the defendant then and there received and undertook to transport the same over said road, and to deliver the same at the freight station in Washington city to the plaintiffs or to their order; that the defendant did transport the flour to Washington City, but did not deliver it to the plaintiffs or their order, although the plaintiffs, within a reasonable time, demanded the same at the said freight station, and were then and there ready and willing to pay the freight, etc., but the defendant, instead of delivering the flour to the plaintiffs, wrongfully delivered the same to some person or persons not authorized by plaintiffs

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to receive it, whereby the same became lost to the plaintiffs, to their damage, etc.

The defendant answered in four paragraphs. A demurrer was sustained to the first and second, and, as they are not claimed to have been good, they need not be further noticed.

The substance of the third paragraph of the answer is that the defendant delivered the flour to one James Gray, the authorized agent of the plaintiffs at Washington city, who had authority from the plaintiffs to receive the same. The fourth paragraph, pleaded only to the first paragraph of the complaint, sets up a delivery of the flour to James Gray, the authorized agent of the plaintiffs to receive the same, substantially as alleged in the third paragraph. In the fourth paragraph some other matters of an affirmative character are alleged, but as no question arises on them, they need not be further stated. Reply in denial.

The cause was tried by a jury, who returned a verdict for the plaintiffs for the sum of four thousand and sixty-two dollars, on which judgment was rendered, a motion for a new trial on behalf of the defendant having been overruled.

Numerous errors are assigned, and we proceed to examine such as are relied upon in the brief of counsel for the appellant.

The point is made that the complaint is bad. It is claimed that the different railroad companies, upon the facts as alleged in the first paragraph of the complaint, are partners; and we suppose it is inferred from that, that the suit cannot be maintained without making them all defendants.

We shall not determine whether the facts alleged in the first paragraph would constitute the several railroad companies entering into the alleged arrangement partners or not. The question is not legitimately in the record. The facts stated in each paragraph of the complaint constitute a good cause of action against the defendant; and if the facts disclosed in the complaint show that other railroad companies are jointly liable with the defendant as partners or otherwise, the objection of their non-joinder should have been taken by

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demurrer assigning that especially as the cause; and that not being done, the objection was waived. 2 G. & H. 77, secs. 50, 54.

It is claimed that the demurrer to the first and second paragraphs of the answer reaches back to the complaint. We think it does. That demurrer was for the want of sufficient facts, etc., and would reach the same defect in the complaint. A demurrer direct to the complaint for the want of sufficient facts, etc., would not reach the defect of non-joinder of a party defendant, there being a good cause of action stated against the party sued; and such demurrer would have to be overruled.

We proceed to other questions in the cause. The defendant moved to suppress certain questions and answers in the depositions of witnesses, taken by the plaintiffs, but the motion was overruled and exception taken. The object of the evidence sought to be suppressed was to establish the value of the flour at the city of Washington, at the time it should have been delivered. The appellant claims that under the bill of lading the rule of damages is established as the value of the flour at the time and place of shipment; and hence that evidence of the value at Washington was irrelevant and incompetent. Granting the premises, the conclusion would seem to follow. But can the premises be conceded? The bill of lading stipulates that, "in the event of the loss of any property," etc., "the value or cost of the same at the point and time of shipment is to govern," etc. But the flour was not lost in the sense in which that term is used in the bill of lading, if, indeed, it was in any sense. By the pleadings in the cause the point in issue was brought within a very narrow compass. The facts alleged in the complaint were admitted because not denied, save, perhaps, so far as they were inconsistent with the special matter set up in the answer. The answer alleges a delivery of the flour to James Gray, the agent of the plaintiffs authorized to receive the same. This is denied by the plaintiffs. Within this issue no question could arise, save that of the delivery of the flour to Gray and

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the authority of Gray to receive it. No loss of the property in the sense of a loss of the thing in specie, or a loss of the substance or matter thereof, as by the destruction thereof by the elements or other casualty, could have been given in evidence under the issues joined; nor could any loss whatever, by which the defendant was deprived of the property and thereby rendered unable to deliver it to the plaintiffs. If the defendant did not deliver the property to Gray, as is alleged, then there was no loss of it whatever; and if she did deliver it to Gray, and if Gray had no authority to receive it, then instead of there being a loss of the property there was a conversion of it by the defendant. Without undertaking to determine what kind of a loss would be embraced in the terms of the bill of lading, we think it very clear that a delivery of the goods by the defendant to a person not entitled to receive them is not a loss of the goods within the spirit and meaning of the contract. The context also supports this view, for it is stipulated that in the event of a loss or damage of the goods for which the company might be liable, she should have the benefit of any insurance effected on them.

We are of opinion that on the issues being found for the plaintiffs, the measure of their damages was the value of the property at Washington at the time it should have been delivered, with interest thereon from that time, and hence that the ruling was right.

On the trial, the court rejected certain questions and answers in depositions taken on behalf of the defendant. These questions and answers had relation to a letter claimed to have been written by McWhinney to James L. Gray. These questions and answers seem to have been properly excluded, for the reason that there was no evidence of the writing of the supposed letter by McWhinney, by proof of his hand-writing or otherwise. A motion had been made before the commencement of the trial to suppress this portion of the depositions, but the motion was not then determined. The plaintiffs having gone through with their evidence, and the defendant being about to read her depositions, the court

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inquired of counsel for the defendant, whether he had any further evidence to offer in relation to the letter named, to which the counsel answered that he had none save what was contained in the depositions. These questions and answers were then excluded. The course pursued seems to have been entirely correct. It was not proper to suppress the evidence in the first instance, because on the trial the lacking link in the chain of evidence, viz., proof that the letter was written by McWhinney, by proof of his signature or otherwise, might have been supplied; and until the counsel for the defendant announced that he had no further evidence on the point except what was contained in the depositions, the court could not know that it would not be supplied. The objection to the testimony was not disclosed on the face of the depositions, but arose from a failure of the defendant to supply the omitted link. The case stood as if the letter had been offered in evidence without proof of its having been written by McWhinney or by his direction.

The objection to the admissibility of the evidence could be taken on the trial. 2 G. & H. 178, sec. 266.

The court, on motion of the plaintiffs, suppressed a number of questions and answers in the depositions taken by the defendant, and in reference to some of them we think the court erred. The following questions and answers were, but we think should not have been, suppressed. George S. Koontz having testified that the flour in question was delivered to James L. Gray, he was asked and answered as follows:

Fifth question. "Who was the said James L. Gray, and why was the said flour delivered to him when it was consigned to James McWhinney & Co.?" Answer. "James L. Gray was the agent of James McWhinney & Co. for the sale of flour having the Richmond brand. Several large lots of this flour consigned to James McWhinney & Co. had been before this delivered to the said Gray as their agent, and the lot in question was delivered to him as agent in the same way."

Fourteenth question. "Please state whether or not any

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flour manifested to James McWhinney & Co., consignees, was delivered to any one else than James L. Gray as agent, and state whether you have any recollection of any lot of McWhinney & Co.'s flour being manifested in any other manner." Answer. "All flour that was manifested to James McWhinney & Co. was delivered to James L. Gray, as agent, as was done in reference to the particular lot in question. I recollect that there was some of McWhinney's flour delivered to S. English, but that was differently manifested."

Deposition of C. Jackson Ringrose.

Sixth question. "Who, in fact, did make sales of flour consigned to James McWhinney & Co., from Richmond, Indiana, in the city of Washington?" Answer. "James L. Gray made sales, and I believe his brother also."

Deposition of Richard W. Gray.

Fourth question. "Do you know whether they (the plaintiffs) had an agent in the city of Washington for the sale of flour? and if so, who was that agent?" Answer. "They had; my brother, James L. Gray."

Fifth question. "Do you know whether your brother received flour from the said firm? and if yea, whether the same was disposed of, and by whom?" Answer. "I know that my brother received several lots and disposed of them for James McWhinney & Co."

Sixth question. "Do you know who made the sales of said lots?" Answer. "I do; my brother, J. L. Gray."

Fifteenth question. "In your answer to a previous interrogatory, you have spoken of your brother as the agent of the plaintiffs. How, of your own knowledge, do you know that he was such agent?" Answer. "All the flour of that brand received in Washington was sold by my brother for a space of some four months. I was in and out of the office when Mr. McWhinney and my brother were making arrangements about the agency."

Sixteenth question. "How many lots of flour were received from the said McWhinney & Co. by your brother prior to the lot in controversy?" Answer. "Three lots

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prior to the lot in controversy. First lot was two hundred barrels; second lot was three hundred barrels; third lot was twenty-four or twenty-six hundred barrels."

We are of opinion that the foregoing evidence was competent and relevant, and that it had some tendency to establish the authority of Gray to receive the flour in question as the agent of the plaintiffs; and, therefore, that the court erred in suppressing it. But it is claimed by the appellees that if the court erred in this respect, the error was harmless, inasmuch as the company did not, in delivering the flour to Gray, rely upon any previous agency or authority in him, to receive flour for the plaintiffs, but solely on the supposed letter from McWhinney to Gray. There is much plausibility in this view, but in looking through the testimony we cannot say from that that such was the fact.

Another error assigned relates to the ruling of the court in giving the plaintiffs the opening and close of the case. The decisions of this court have been fluctuating on this point. It may, perhaps, now be regarded as settled that where the plaintiff, under the issues, has anything to prove in the first instance, in order to entitle him to recover, or where he is required to prove his damages in cases where the damages cannot be ascertained by mere computation, he is entitled to open and close. *Fetters v. The Muncie National Bank*, 34 Ind. 25.

Here the plaintiffs were required to prove their damages, in order to recover beyond such as were merely nominal, and consequently they were entitled to open and close.

The defendant asked the following instructions, which were refused:

2d. "If the defendant has shown James L. Gray to have been the agent of the plaintiffs, receiving for them different lots of flour during a period of four months immediately prior to the lot in question, consigned to James McWhinney & Co., from said defendant, and continued to transact business for them in receiving from defendant lots of flour so consigned, up to the time of the receipt of the lot in ques-

tion, and no question was made or notice given to the contrary, if there was an end put to the agency it was for the plaintiffs to show it; and if they have failed to show the determination of it, the jury should find that said agency continued."

3d. "If the jury believe from the evidence, that James L. Gray had been the agent of the plaintiffs in Washington city, D. C., to receive flour consigned to James McWhinney & Co., shortly before the time of the delivery of the lot in controversy, transported on the defendant's road, and had received several large lots from defendant before the lot in controversy, the defendant was justified in delivering said last lot to said Gray, unless plaintiffs have proven that prior to said delivery defendant was notified of the termination of said agency."

These charges seem to have been correct in the abstract; *Pursley v. Morrison*, 7 Ind. 356; and we can hardly say that they were totally inapplicable to the case made by the evidence. At least, it may be said that if the portion of the depositions which was erroneously suppressed had gone to the jury, the charges would have been applicable, and should have been given.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

W. A. Bickle, for appellant.

J. P. Siddall and *C. H. Burchenal*, for appellees.

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38	425
149	244
149	245

AGENT.—*Misrepresentation*.—*Concealment*.—*Statute of Limitations*.—An action was brought in 1870 by A. against B., the complaint alleging that B. had, in the year 1848, falsely represented himself to A. as the agent of C., to whom A. was indebted on a promissory note, and as such agent had received

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from A. the money due C. and promised to pay the same to C. and take up and destroy the note; but that B. had retained the money himself, and A. had only discovered the fact about the time of the bringing of the suit; and B. in answer pleaded the statute of limitations, to which A. replied, that he paid the money to B. on his claim that he was the agent of C., and believing him to be such agent and authorized to receive the same, when in fact he was not such agent nor had such authority, but concealed such fact from A. and promised to pay the same over as such agent, which he failed to do, and by reason of such concealment A. did not discover the cause of action until in the fall of 1869.

Held, that the reply was insufficient to avoid the statute; that the concealment was all previous to the accruing of the cause of action, and something more is required to avoid the statute than mere silence after the action accrues.

WITNESS.—Husband and Wife.—At common law, where the husband was excluded as a witness on the ground of interest, the wife was also excluded. The statute has not changed the rule that husband and wife are incompetent witnesses for or against each other. Where the husband is made a party to answer to an assignment by him of a cause of action to the plaintiff, and the assignment is not questioned, the wife may testify as to other matters; but where the husband has a pecuniary interest in the result of the action, she cannot be a witness.

APPEAL from the Henry Circuit Court.

DOWNNEY, J.—Stanton sued Stanley on the 19th day of February, 1870, alleging that in 1848, Seth Cox was indebted to Zachariah Bennett in the sum of one hundred dollars and fifty cents, due on the 25th of December, 1848, and paid the same to the defendant upon his representation that he was authorized, as the agent of Bennett, to receive the same, and on his special agreement that he would pay it to said Bennett, and take up Cox's note previously given for the same, and then in the hands of Bennett, and return it to Cox, or destroy it; the said Cox relied on the statements and promise of the defendant, and supposed he had done as he had promised, until in the fall of 1869, when the defendant told Cox, for the first time, that he had not done so, and had not been the agent of Bennett, or authorized by him to receive said money; by which means the defendant became indebted to Cox in the said sum of one hundred dollars and fifty cents, which indebtedness, and the fact of his failure to pay over to said Bennett the said money, and that he was

not agent to receive the same for said Bennett, the said Stanley thenceforward until the fall of 1869, concealed from said Cox; that the defendant refused, and yet refuses to pay the said sum of money, amounting, with the interest, to two hundred and twenty-seven dollars and sixty-three cents, so falling due to said Cox from him; that Cox sold and assigned the same, for value received, to the plaintiff, on the 1st day of February, 1870, as per account and assignment thereof filed with the complaint. Cox was made a defendant to answer as to his interest in the account and as to the assignment thereof.

After demurring unsuccessfully to the complaint, Stanley answered: first, by a general denial; second, statute of limitations of six years; third, that the plaintiff is not the real party in interest in said action, but, on the contrary, the said defendant Cox is the real party in interest, who fraudulently transferred said pretended cause of action to the plaintiff, for the purpose of rendering the wife of said Cox a competent witness in said cause; that said pretended cause of action was transferred to said plaintiff without any consideration; fourth, that Cox is the real party in interest in said cause, and the transfer of said pretended cause of action was champertous and void, in this, that the plaintiff gave said defendant Cox no consideration therefor, but by the terms of the contract was to collect the same and bear all expenses of collection, and pay over to said defendant Cox fifty per cent. of the proceeds of said claim, and in the event of said plaintiff failing to collect the same, Cox was to pay the costs and attorney's fees.

There was a reply filed, which consisted, first, of a general denial of the whole answer; and second, in addition thereto, as to the second paragraph of the answer, as follows: that Cox paid the money to the defendant on his claim that he was the agent of the said Bennett, and authorized to receive the same, when in point of fact he was not such agent, or authorized to receive said money; and he says that when said money was so paid the defendant, he concealed from said Cox

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the fact that he was not such agent, and while assuring the said Cox that he was such agent, pledged himself to pay over the money to Bennett and take up and destroy the note of said Cox in his hands before letting him have the money; which statement of facts as to his agency, and as to the payment of the money and the destruction of the note as aforesaid, was made to conceal the fact that he was not the agent of said Bennett, and by the receipt of the money from said Cox he became liable to him for it, and to avoid inquiries on the part of Cox as to the facts, and to prevent him from making any demand on him for the money, and the same had this effect; and the plaintiff says that said Cox never learned until the fall of 1869 that said Stanley was not the agent of said Bennett, and was not authorized to receive said money, and had not destroyed said note. The facts in manner and form aforesaid, and that he owed said money, the defendant concealed from said Cox until the fall of 1869.

The defendant, Stanley, demurred to the second paragraph of the reply, and his demurrer was overruled, to which he excepted.

A trial by jury terminated in a general verdict for the plaintiff for \$228.60, and also certain special findings in answer to interrogatories propounded, which, however, we need not specially notice.

A motion for a new trial was made by the defendant, which was overruled, and he excepted. The evidence is all in the record.

The first alleged error is the action of the court in overruling the defendant's demurrer to the second paragraph of the reply. Counsel for the appellee rely exclusively on *Boyd v. Boyd*, 27 Ind. 429. In that case the reply alleged that the defendant had concealed his liability to the action by certain false pretences made by himself, and certain misrepresentations which he induced others to make, as to subsequent transactions, the actual truth of which would otherwise have been known to the plaintiff, and would have put him on inquiry, whereby he would have discovered the fraud; that

thus deceived he remained ignorant of the facts, etc. It is very evident that the reply in that case differs in one essential particular, at least, from the reply in this case. There the false pretences made by himself and the misrepresentations by others which he induced them to make were as to subsequent transactions, the truth of which would otherwise have been known to the plaintiff.

In this case no such allegation is in the reply. The facts, and only the facts, necessary to show the existence of it, are relied upon to show a concealment of the cause of action. It seems to us to be a contradiction in terms to talk of concealing a cause of action before the same has any existence. When did the cause of action accrue? Not, surely, when the money was placed in the hands of the defendant, Stanley, for he was entitled to a reasonable time, at least, in which to pay the money over to Bennett before any right of action could have accrued to any one to sue him for a breach of the undertaking.

In *Earnhart v. Robertson*, 10 Ind. 8, facts are disclosed which present such a case as seems to us to have been contemplated by the legislature in the enactment of the statute in question, 2 G. & H. 162, sec. 219. There, the defendant was employed to collect certain money at a distant point, and did so collect it, but after he had done so, and had returned to this State, he falsely represented to his principal that he had collected a much smaller amount, and no more. Afterwards, on inquiry made of him by his principal, whose suspicions had been excited, he again affirmed that he had collected no more money.

The provision in the criminal code, 2 G. & H. 393, sec. 13, "conceals the fact of the crime," is so nearly similar to the provision in question as to render the decisions in relation thereto authority on this question. In *Jones v. The State*, 14 Ind. 120, it was held that the concealment must be the result of positive acts done by the accused, and calculated to prevent a discovery of the fact of the commission of the of-

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fence of which he stands charged. This case was followed and approved in the case of *Randolph v. The State*, 14 Ind. 232, and it was then held that the particular acts of concealment must be set out in the indictment.

In *Free v. The State*, 13 Ind. 324, it was held, that the fact that the owner of stolen goods and his family did not know that the goods had been stolen, did not prove a concealment on the part of the defendant.

In the case of *Boyd v. Boyd, supra*, it was held that something more than mere silence on the part of the party liable was necessary to show concealment.

In our judgment, the demurrer to the second paragraph of the reply should have been sustained.

Slender as are the allegations of the reply, the evidence in their support is still weaker. On the question as to whether or not Stanley represented himself as the agent of Bennett, Seth Cox swears as follows: "Before the note fell due, I paid the full amount of it to Ira Stanley, at my house, in the presence of my wife, the said Stanley being (as he declared) at the time he sold the land, and as I supposed still was, the agent of Bennett and authorized to receive it," etc. Stanley very positively denies that he was, or pretended to be, agent for Bennett, or that he ever received the money; while Mrs. Cox states that in the fall of the year 1848, "my husband, Seth Cox, one of the defendants, paid to Ira Stanley one hundred dollars and fifty cents, being the amount of a note held by him in favor of Zachariah Bennett. The money was paid before the note was due. The money was paid at our house. The note was given for a piece of land purchased by my husband from Z. Bennett by Ira Stanley, his agent, as he represented himself to be. At the time the money was paid, as I have stated, we resided in Henry county, Indiana. When the money was paid, Stanley had not the note with him, but said Bennett had the note in his possession, and that he, Stanley, would not pay the money to Bennett until he got the note, and that he would then destroy it."

This evidence simply shows, if it proves anything, that Cox

gave the money to Stanley, as his agent, to pay it to Bennett, and leaves the case to rest, so far as the evidence is concerned, upon contract exclusively, without the element of fraud. It is the fact that Stanley was not the agent of Bennett which the reply alleges he concealed from Cox, and as it is not shown by the evidence that Stanley represented that he was agent at the time when the money was handed to him, the evidence does not sustain the reply, even if it was sufficient to avoid the answer. If one agrees to do a thing and simply fails to do it, we think it cannot be said that he has concealed the cause of action which the party to whom he made the promise may have against him for the non-performance of the promise.

The next question is as to the admissibility of Ruth Cox, the wife of the assignor of the chose in action, as a witness for the plaintiff. Her husband was a party to the action, but only to answer as to his interest in the claim and the assignment thereof by him to Stanton, the plaintiff. There are strong indications of something concealed in the arrangements with reference to the assignment of the claim. Seth Cox swears, in his deposition, that his brother, Joseph M. Cox, made the sale and assignment of the claim for him as his agent, to Stanton, and that neither he nor his brother has any interest in the claim; and yet, on cross examination, he swears that he holds his brother's obligation for the claim as follows:

"DUBLIN, IND., NOV. 14, 1870.

"I now hold myself responsible to thee for seventy-five dollars, for the amount, subject, as it is, to all contingences, payable within nine months; what I make above that is my gain, and if I lose, it is my loss; the expense incurred prior to this I deduct from the money left in my hands, an account of which I will send thee.

[STAMP]

JOSEPH M. COX."

Stanton, the plaintiff, swears that he was not to pay the costs in this case if it went against him; that Joseph M. Cox was to pay them.

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Joseph M. Cox swears that he purchased the claim from his brother, and arranged with Stanton to sue upon it on certain conditions, one of which was that Stanton should pay him one hundred dollars, on condition "that on the testimony of Seth Cox and wife this suit should be gained." It was after this arrangement, between Stanton and Joseph M. Cox, that the latter gave the obligation to his brother which is set out above.

Mr. Julian, before the assignment of the account, had an agreement with Seth Cox to defend him against a suit on the Bennett note, and for his services in that suit and in this, as we understand the testimony, if it should be brought, he was to have one hundred dollars, if he succeeded, and only ten dollars if he did not succeed; and he was to have the one hundred dollars out of the judgment, if one was recovered in this case.

Upon these facts it is insisted by the appellant that Seth Cox was interested, pecuniarily, in the result of the action, and that, consequently, his wife could not be a witness.

As we understand the testimony of Mr. Julian, he has a claim for services against Seth Cox, which, in the event of a successful termination of this action, will be paid out of the judgment, but which if not thus paid must be paid to him by Seth Cox. This made Seth Cox pecuniarily interested in the suit to that extent. *Starkie Ev. by Sharswood*, 119.

Did that interest of Seth Cox disqualify his wife, or render her incompetent as a witness? We do not regard the mere fact that Seth Cox was a party to the suit to answer as to the assignment as sufficient, where no question was made as to the assignment, and where the wife did not testify on that subject, as any objection to her testifying. *Shellenbarger v. Norris*, 2 Ind. 285. If he had a substantial interest in the questions at issue, then clearly she could testify neither for nor against him. *Wickel v. Probasco*, 7 Ind. 690; 2 G. & H. 170, sec. 240; *Robertson v. Caldwell*, 9 Ind. 515; *Muir v. Gibson*, 8 Ind. 187; *Carpenter v. Dame*, 10 Ind. 128; *Woolley v. Turner*, 13 Ind. 253. But here, besides being such party to

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the action, the husband had a pecuniary interest in the result of the action. If it was successful, it relieved him of a liability which he had previously assumed. If not, it left that liability upon him.

By the rule at common law, when the husband was excluded on the ground of interest, the wife was also incompetent. When the rule was changed in this State so as to admit parties and persons otherwise interested in the result of the action to testify, the statute still preserved the old rule, that "husband and wife are incompetent witnesses for or against each other, and they cannot disclose any communication from one to the other, made during the existence of the marriage relation, whether called as witnesses while that relation exists or afterward." The last enactment of the legislature on this subject, with the same care for the harmony and sacredness of the relation, prohibits them from testifying "as to matters for or against each other," etc. 3 Ind. Stat. 560, sec. 2. We are of opinion that this rule of exclusion, or incompetency to testify, is not confined to cases where the one is a party to the suit, and the other is offered as a witness in the cause for or against the other. The language of the statutes cited does not require any such construction. We think rather that it was the intention of the legislature to retain the common law rule on this point. We therefore hold that the testimony of Mrs. Cox was incompetent.

There are some other points discussed in the briefs, but we do not think it necessary to examine them.

The judgment is reversed back to, and including, the ruling on the demurrer to the second paragraph of the reply, with instructions to sustain that demurrer, and for further proceedings. Costs to the appellant.

M. E. Forkner and *E. H. Bundy*, for appellant.

J. B. Julian and *J. F. Julian*, for appellee.

Ney v. Swinney.

NEY v. SWINNEY.

TRESPASS TO LAND.—Railroad.—Appropriation.—Appeal.—In an action for trespass to land and for an injunction, the defendant answered, that he was acting in behalf of a railroad company that had filed her maps and surveys in the office of the clerk of the circuit court, and had afterwards filed in said office her instrument of appropriation and served a copy on the plaintiff and had applied to the circuit court for the appointment of appraisers, who had been so appointed and had appraised the damages to the land of the plaintiff through which the road passed; that the damages had been tendered to the plaintiff and afterwards paid into court; and that afterwards, within the ten days allowed by law, the plaintiff had filed his exceptions to the award of the appraisers which were still undetermined. On the application for a temporary injunction, the court granted the same, upon the affidavit of the plaintiff that no attempt had been made by the company to purchase from him before condemning.

Held, that the filing of the instrument of appropriation and service of a copy were jurisdictional facts which must have been passed upon in favor of the railroad company when the court assumed jurisdiction of the subject-matter, and its action could not thus be questioned collaterally.

Held, also, that the plaintiff, having appeared to the proceedings to appropriate his property, and filed his exceptions, and taken his appeal, could not, while those proceeding were pending, seek another remedy by injunction or otherwise.

APPEAL from Allen Circuit Court.

PETTIT, J.—This was an action for trespass to land and for an injunction, by the appellee against the appellant. The answer of the appellant, which was sworn to, and the affidavits set out show the following state of facts:

The Fort Wayne, Muncie, and Cincinnati Railway Company, whose road runs through the lands of the appellee, on the 14th day of June, 1870, filed in the office of the clerk of the Allen Circuit Court, her map and profile of said line, and afterward, on the — day of June, 1870, filed in the office of said clerk, her instrument of appropriation, as required by the fifteenth section of the railroad act, 1 G. & H. 510, and, having served a copy thereof on the appellee, she, on the 23d day of June, 1870, applied to the Allen Circuit Court, then in session, for the appointment of appraisers. Three appraisers were duly appointed, who, under oath,

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36	454
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fixed the damages of the appellee at two thousand dollars, their return being in writing and filed in the court. These damages were first tendered to the appellee, and afterward paid to the clerk.

Within the ten days allowed by law, the appellee filed his exceptions to the award, which have never been acted upon, but the cause is still pending in the Allen Circuit Court. The record of this case shows the appearance of the appellee in every stage of the proceedings. A copy of the entire record of these proceedings to appropriate is set out in the bill of exceptions.

The contract for the building of the road was let to the appellant, who immediately commenced work, which the appellee sought, by this action, to stop.

Upon the hearing for a temporary injunction, the appellant justifying under the railroad company, the appellee filed his affidavit denying that any attempt had been made by the company to purchase of him prior to condemning, and the judge, holding such negotiation to be a condition precedent, granted the injunction.

We think the judge erred, for the following reasons:

Aside from all questions of waiver by the appellee, which will be discussed hereafter, the proceedings of the circuit court for the condemnation of this right of way are not to be upset in this collateral way. If there is one thing which must be regarded as settled law in this State, it is that the proceedings of our courts of general jurisdiction, in relation to a subject-matter within that jurisdiction, cannot be questioned collaterally. And this applies not only to those facts actually determined, but equally so to those which, being conditions precedent, the court should have determined before assuming to act in the premises.

The language of Mr. Justice FRAZER delivering the opinion of this court in the very thoroughly considered case of *Dequindre v. Williams*, 31 Ind. 444, is directly in point. In that case the proceeding to appoint a guardian was *ex parte*. In that case, as in this, there was no written application on

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file alleging the jurisdictional facts; in that case certainly the residence of the minors in this State was quite as important a jurisdictional fact as an attempt to negotiate before proceedings to condemn in this case; yet it was held that inasmuch as the probate court had no right to appoint a guardian unless the minors were residents, therefore the court must be presumed to have passed upon that question; and although such finding was contrary to the facts, yet that error cannot be shown in a collateral action.

Now, how is it in the case at bar? In our view, the antecedent negotiation is not a jurisdictional fact. "The power to hear and determine a cause is jurisdiction." *United States v. Arredondo*, 6 Pet. 709. "Any movement by a court is necessarily the exercise of jurisdiction." *Rhode Island v. Massachusetts*, 12 Pet. 718; *Dequindre v. Williams*, 31 Ind. 444. In this proceeding to condemn, there were just two jurisdictional facts, viz.: the filing of the instrument of appropriation, and the service of a copy thereof on the owner of the land; the former bringing the subject-matter, and the latter the person, before the court.

These two facts being shown, the court was invested with jurisdiction; "the power to hear and determine the cause;" to appoint or refuse to appoint appraisers, according to the evidence.

The antecedent negotiation is no more a jurisdictional fact than a demand in a case where it is necessary to a recovery. A demand is in such case a condition precedent, because without it there is no right of action; yet no one would contend that a judgment for the plaintiff in such case, even in a justice's court, could be upset in a collateral action by showing that, in fact, no demand had been made. So, that a debt be due, is a condition precedent to a right of action upon it; but a judgment for such debt, in any court, before due, would not for that reason be void collaterally. Precisely so in the case at bar. The instrument of appropriation being filed, the copy served, and application made, it was then the duty of the court to hear evidence and grant or refuse the

application; and the court having so acted and appointed the appraisers, the inevitable and unimpeachable presumption is that its action was right and upon proof of the necessary facts.

In the case of *Dequindre v. Williams, supra*, the residence of the minors in the State was admitted to be a jurisdictional fact lying at the very threshold of the proceeding; and yet the court say, "when the proceeding is of such a character that, before final action, the court should, from the nature of the case, ascertain whether it is such in fact that it has jurisdiction to act as it is invoked to do, and it does so act, the matter cannot be questioned collaterally." See, also, *Green v. Beeson*, 31 Ind. 7; *Evansville, etc., R. R. Co. v. Evansville*, 15 Ind. 395; *Spaulding v. Baldwin*, 31 Ind. 376; *Church v. Northern Central Railway*, 45 Penn. St. 339; *Embury v. Conner*, 3 N. Y. 511; *Little Miami Railroad Co. v. Perrin*, 16 Ohio, 479; *Pullan v. Kinsinger*, 9 Am. Law Reg. (N. S.) 557. This last is a very elaborate opinion by Emmons, United States Circuit Judge for the Southern District of Ohio, in a case of much importance.

Nor will it do to say that the court in this case is exercising a special statutory power, and therefore to be executed strictly according to law to be valid.

This precise point was made and relied upon against the record of the probate court in the case of *Dequindre v. Williams, supra*, but the court, after stating that in this country the power to appoint guardians resides primarily in the legislature, say: "If then, the legislature chose to require that this authority should be exercised by a court of superior jurisdiction, the validity of the record of such court, in a given case of the kind, must be tested by the rules ordinarily applicable to its records."

Apply this language to the case in hand. In the language of the Supreme Court of Illinois, "the right of eminent domain, by which private property may be taken for public use, is an inherent sovereign power, and can be exercised *ad libitum* by making just compensation to the

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owner. * * * With this limitation, the manner in which it shall be exercised is in the discretion of the legislature." *Johnson v. Joliet, etc., R. R. Co.*, 23 Ill. 202. In the same opinion it is held that the law is valid, though it provides for no notice to the owner, or for swearing the appraisers, or when their return shall be made.

In our State, the legislature, being thus invested with this sovereign power, has seen fit to require that this authority should be exercised by the circuit court; "and the validity of the record of such court in this case must be tested by the rules ordinarily applicable to its records." But if it were admitted (and this is all that is ever claimed on this behalf), that a court, in the exercise of a statutory power, sits as an inferior court, and its records are tested by the rules applicable to the records of such courts; still, all that is required in such case is, that the record shall show the jurisdiction; and as it has already been shown that all of the jurisdictional facts in this proceeding to condemn appear affirmatively in the record, any objection on this score falls to the ground.

See *The Galena, etc., R. R. Co. v. Pound*, 22 Ill. 399. This case is directly in point, the statutes of that state and ours being similar on this point. Revised Statutes of Ill. of 1869, 546.

The proceeding to condemn land under the fifteenth section of the railroad act is an adversary proceeding; the filing the act of appropriation and service of a copy upon the owner of the land is notice to the party of the pendency of a suit. When this is done, the court may appoint appraisers. That the other party may appear at this stage of the proceedings, is shown by the seventeenth section, which requires the court to appoint some attorney to appear and protect the rights of absent or unknown owners, who have not appeared, etc. The appellee, as the owner of the land, had not only the right to appear and object to the appointment of the appraisers, or perhaps avail himself of any previous irregularity, if any existed; but the record shows that he did actually appear at

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every stage of the proceedings, and is, therefore, concluded by the record.

If, however, a doubt can arise as to the conclusive character of these proceedings to condemn the land, upon general principles, when attacked collaterally, the subsequent provisions of the statute providing for an appeal must remove it. Within ten days after the return of the award, either party may appear and file written exceptions to the award, "and the court shall take such order therein as right and justice may require, by ordering a new appraisement, on good cause shown; Provided, That notwithstanding such appeal, such company may take possession," etc., "and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed." 1 G. & H. 511.

There can be no doubt that the legislature intended that a railroad company, which had in good faith proceeded under this act, so far as to have appraisers appointed, the damages assessed and tendered to the owner of the land, or paid to the clerk, should be protected in its possession of the property, and not be harassed by injunctions or other suits, especially after the owner of the land had appeared and filed exceptions to the report.

It will be observed that whatever exceptions have been taken to the award, the only thing the court can do is "to order a new appraisement on good cause shown," and the only question which can be afterwards tried in the cause is the amount of damages or compensation to be paid for the property.

By appearing and making no objection to the appointment of the appraisers, the appellee waived all previous irregularities; but, conceding that the proceedings in the circuit court would have been void for the want of jurisdiction, in case the appellee had not appeared, the most that can be claimed for him is that he had a choice of remedies, the common law remedy by action of trespass and injunction, or the statutory remedy by excepting to the award and taking his appeal.

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By filing his exceptions within the time allowed by law, he has elected to take the statutory remedy, and must take it upon the terms prescribed by the statute, viz.: that no other questions than the amount of damages can be tried. The statute was before him, and when he elected to take this statutory remedy, he knew that nothing else could be done by the court than to order a new assessment, and that nothing else could be tried upon the appeal than the question of damages, and that pending such appeal the company might proceed with its work. As a party contracting with an assumed corporation is afterward estopped to deny its corporate character, so by taking this appeal the land-owner estops himself as to every question except the amount of compensation.

If the proceedings on the appeal can only affect the amount of compensation to be allowed, it matters not how irregular the previous proceedings may have been in other respects; and if, notwithstanding, the company may take possession of the property, etc., how can the court deprive it of that right by injunction?

The appeal is still pending in the circuit court for trial. Suppose that case is tried, the damages re-assessed and paid, what is to become of this case? Could the appellee still prosecute this suit to final judgment and recover damages? If not, the pendency of the former proceedings ought to bar this; else he can prosecute two suits for the same cause of action at the same time and in the same court.

The judge first grants an injunction on the ground that the proceedings pending in the Allen Circuit Court for the appropriation of the land were void for the want of jurisdiction, and then modifies his injunction so that it will operate only until the determination of the pending proceedings to condemn the land; thereby seeming to recognize such pending proceedings as the case in which the ultimate rights of the parties, that is, the amount of compensation, is to be determined.

Dyckman v. The Mayor of New York, 5 N. Y. 434, was an action of ejectment to recover land appropriated for the

waterworks. Judge GARDINER says, 442, "These matters now insisted upon, as depriving the Vice-Chancellor of jurisdiction, were irregularities which could be, and were waived by the voluntary appearance of the plaintiff." He also holds that the existence of such jurisdictional facts cannot be controverted in a collateral action.

In *The Little Miami R. R. Co. v. Perrin*, 16 Ohio, 479, it was held that when land had been entered upon by a company, valued under a judge's warrant, and an appeal taken to the common pleas from the assessment, it was error in the court to quash the proceedings; that though the warrant contain no statement of an attempt to purchase, or that the land was indispensable, etc., the common pleas had jurisdiction of the case on appeal.

This decision was under a statute similar to ours, giving an appeal from the valuation, and "the court, for good cause shown, may order a new valuation," etc. This statute was held to imply what ours expresses, that no other question than the amount of damages should be tried.

In *Borland v. The M. & M. R. R. Co.*, 8 Iowa, 148, it was held that upon an appeal from the assessment of damages to land taken by a railroad, nothing but the question of damages could be tried; that the appeal took the cause upon its merits, and it enabled them, in effect, to set right the consequences of any wrong-doing or partiality of the commissioners or sheriff. It became immaterial whether they had notice.

In *The M. & M. R. R. Co. v. Rosseau*, 8 Iowa, 373, the court ordered certain exceptions to the award to be stricken out, for the reason that the cause on appeal was to be tried on its merits, and not upon exceptions taken to the action of the sheriff or jury, or the incompetency of either of them; that the appeal was from the assessment of the jury, and in the district court the only question is whether the owner is entitled to a greater amount than was awarded to him. But as it is urged that this exercise of the right of eminent domain being *strictissimi juris*, the statute must be exactly followed, the adjudications with reference to highways, involving the

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exercise of the same power, may shed some light on these questions.

The case of *Little v. Thompson*, 24 Ind. 146, was an appeal from an order of the board of commissioners opening a highway. The appellant, in the circuit court, attempted to controvert the sufficiency of the notice, and the court held that as to notice, as well as all other jurisdictional facts, no objection can be entertained in the circuit court, or even in the commissioners' court, after the appointment of the original viewers.

Again, in *Wright v. Wells*, 29 Ind. 354, which was another case of the same kind, the court cites approvingly the decision in *Little v. Thompson*, *supra*, and after holding as in that case, that objections of this kind must be made before the appointment of viewers in the first instance, it is further decided that only two questions can be litigated on such appeal, viz.: the utility of the proposed highway and the claim for damages. To the same effect is the case of *Kemp v. Smith*, 7 Ind. 471.

The statute above referred to says, that "subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed." This provision is the law, or it is not. If it is not the law, it must be in consequence of its repugnance to the constitution, but no one has ventured to suggest any such objection. If, then, it is the law, and it has any meaning or effect at all, that meaning and effect is, that when a party files his exceptions to the award, and thereby takes his appeal, he has waived, and is from that time estopped to raise or litigate any question except the amount of compensation. If such is not the effect, then this provision is a nullity; for, without it, if the proceedings were all regular, the appeal could only affect the amount of compensation. Legislation can change this law so as to make it mean something else, judicial interpretation never can. It is hardly necessary to add that, if such is the effect of this appeal in the original proceeding, the record is not less conclusive when attacked collaterally.

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The appellee having appeared to the proceedings to appropriate his property for the use of the railroad company, filed his exceptions to the assessment of damages by the appraisers, and taken an appeal to the circuit court, he has chosen his line of action to redress his supposed wrong, and he cannot, while that proceeding is pending, seek another in any court; by injunction or otherwise. The decree granting an injunction is reversed, at the costs of the appellee, with instructions to the court below to dissolve the injunction and dismiss the complaint.

WORDEN, C. J., having been of counsel, was absent.
W. H. Coombs and *W. H. H. Miller*, for appellant.

GRAHAM v. THE CONNERSVILLE AND NEW CASTLE JUNCTION
 RAILROAD COMPANY.

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RAILROAD.—*Trespass to Land.—Appropriation.*—Where a railroad company has, without the consent of the owner and without color of title, entered upon land and occupied the same, building a depot and hotel thereon, and afterward seeks to appropriate the land under the authority of law, the value of the land at the time of the legal appropriation, with the improvement thereon, constitutes the amount for which the company is liable to the owner of the land.

APPEAL from the Wayne Common Pleas.

DOWNEY, J.—This was a proceeding to condemn and appropriate certain real estate of Graham to the use of the railroad company, instituted in the common pleas. The instrument of appropriation was filed in the clerk's office on the 3d day of June, 1867, and required the appellant to take notice that the railroad company had thereupon appropriated and then filed in the office of said clerk their instrument of appropriation of the following lots in Cambridge City, Wayne county, Indiana, to wit: lots 14, 15, 16, in block 17, west of the river, and south of the road, for the use of

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the railroad for tracks, road bed, depot buildings, and other purposes connected with said railroad. Appraisers were thereupon appointed by the judge of said court, after publication of notice to the appellant, who was a non-resident of the State.

The appraisers reported, that on the 25th day of July, 1867, they made the appraisement, giving for lot 16, seventy-five dollars, for lot 15, fifty dollars, and for lot 14, forty dollars, being the damages to the appellant from the appropriation of said lots. They state that they "estimated the damages at the time the lots were occupied, about two years ago, by said company, and exclude any improvements since made by said company or other companies."

The appellant excepted to the award on the grounds, first, that the award was largely and grossly below the value of said lots at the time said commissioners estimated said damages, two years ago.

Second. The commissioners wrongfully and illegally estimated the damages accruing by reason of said appropriation at the time said company first took possession of said lots, to wit, two years ago, and not at the time said lots were legally appropriated by said company, to wit, at the time of the filing of said instrument of appropriation herein, in May, 1867, and the appraisement this day made, at which time only said appropriation was legally made.

Third. Said commissioners wrongfully and illegally excluded from their consideration the value of the improvements situated on said lots at the time said company commenced to legally appropriate the same, to wit, in May, 1867, which improvements are of the value of at least two thousand dollars, and said lots and improvements were at said time of the fair value of three thousand dollars.

Fourth. That the manner of appointment of said commissioners herein is illegal and wrongful, in this: that it directs said commissioners to estimate said damages at the time of the actual appropriation of said lots, which actual appropriation said commissioners contend is equivalent to

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actual occupation or possession of said lots by said company over two years ago.

Fifth. That said commissioners illegally and wrongfully excluded from their consideration the increased value of said lots arising from the construction of said company's road into said town.

Sixth. That on the — day of May, 1867, said company filed their instrument of appropriation of said lots in the Wayne Common Pleas Court; that on the 13th day of July, 1867, said commissioners herein were by warrant of appointment to appraise the damages accruing by the appropriation made by said company, and that on the 25th day of July, 1867, said commissioners made their award in the premises, the amount of which said award has not been paid or tendered; that prior to the filing of said instrument of appropriation and the award thereafter made, and the payment of said award, which accrued at the time aforesaid, said company had no right or title, or color of title, to said lots; but the same were, until legally appropriated, the property of said Graham; yet said commissioners illegally fixed the damages arising from said appropriation, at the time, to wit, several years ago, when said company illegally took possession of said lots, and before they in any way sought to condemn said lots to the use of said company.

Seventh. That said lots when condemned and appropriated by said company were of the value of at least two thousand five hundred dollars; but said commissioners refused to estimate said damages at the time of said condemnation, and wrongfully estimated such damages at a time several years before such condemnation and appropriation. Wherefore he asked that said award be set aside, and for such further orders and proceedings in the premises as right and justice require.

Upon a general denial of these exceptions there was a trial by the court, which resulted in the following special finding: "The court having heard and duly considered the

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evidence, and seen and examined the papers in the cause, finds that in the spring of 1866, the defendant, George Graham, was the owner in fee simple of lots 14, 15, and 16, in block 17, west of the river, and south of the national road, in Cambridge City, Wayne county, Indiana; that said Graham had for the last forty years been a resident of Cincinnati, Ohio; that at said time there was upon said lots an embankment or road bed constructed by some railroad company, the name of which was not proven to the court, and that at the time aforesaid said plaintiff took possession of said embankment or road bed, and laid its track thereon; that said track ran diagonally through said lots from the north-west to the south-east; that in the fall following, that portion of said lots lying north of said track, and fronting north to the Columbus and Indianapolis Central Railway was taken possession of by said plaintiff, and a depot and other buildings built thereon, and that said company is now in the possession thereof; that said defendant never gave his consent to the occupation or appropriation of said lots, and that said company took possession of and appropriated said lots without the knowledge or consent of said defendant; that said lots were worth, at the time they were taken possession of by said company, exclusive of any improvements afterward put upon them by said company, the sum of one hundred dollars.

"It is therefore considered and adjudged by the court that said plaintiff do pay into court, for the use of said defendant, the said sum of one hundred dollars, and that when the said sum is so paid, by the said plaintiff, the title to said lots, numbers 14, 15, and 16, in block 17, west of the river and south of the national road, in Cambridge City, Wayne county, Indiana, shall vest in the said Connersville and New Castle Junction Railroad Company." Judgment for costs in favor of Graham. There was an exception to the special finding by Graham. He also moved the court for a new trial, for the following reasons: First, the finding of the court on the facts is contrary to the evidence; second, the conclusions of

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law drawn by the court from the facts found are contrary to law; third, error of the court in excluding answers to the questions numbered one to twelve, asked of Graham, Raymond and Markle; fourth, in refusing to allow the damages for the lots in controversy to be assessed for the value of the same at the time of the trial, no compensation having been previously paid or tendered; fifth, error of the court in compelling said Graham to accept as the measure of his damages the value of the lots in controversy at the time said company illegally and wrongfully entered into possession of the same, in opposition to the will of said Graham, and several years before said company instituted any proceeding to appropriate the same; sixth, error of the court in the instruction given to the commissioners to assess the damages at the time the plaintiff took actual possession of the lots in controversy, instead of assessing the same at the time of assessment made. This motion was overruled, and to this ruling the defendant excepted. The evidence given on the trial is set out in a bill of exceptions in the record.

The errors assigned are: first, the giving of improper instructions to the appraisers; second, the improper assessment of the damages at the time the company wrongfully took possession of the lots, instead of at the time of the legal proceedings for the appropriation of the property; third, in excluding the value of the improvements on the lots, at the time of the legal appropriation, in estimating the damages; fourth, in excluding evidence offered; fifth, in overruling the defendant's motion for a new trial.

By the evidence excluded the defendant sought to prove the damages with reference to the value of the property at the time the company took legal steps to appropriate the same, June 3d, 1867, by showing the value of the lots at that time, and also by showing the value of the lots and the improvements put on them by the company, consisting of a depot building, hotel, etc., at that date. This the court refused to allow. The answers to two or three questions will settle all the points of difference between the parties.

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First. To what point of time should the inquiry with reference to the amount of damages relate? to the time when the company took possession of the lots, or to the time when the proceeding was legally commenced to condemn and appropriate the lots or the use of them?

Second. If the inquiry should relate to the time when the proceeding to appropriate the property was commenced, should the value of the improvements which the company had previously to that time put on the lots be included in estimating the damages?

Upon the first point we are clearly of the opinion that the inquiry should relate to the time when the company proceeded to appropriate the lots or the use of them, and not to the time when the company, without right or legal authority, took possession of them. It may be conceded that a railroad corporation has the right, without a previous assessment of damages, to enter upon lands belonging to another person, and make surveys with a view to a location of its road; but it cannot be that such a company can legally go upon the lands of another and take and hold possession thereof, and construct its road and erect buildings thereon, without first having acquired the right to do so by grant, or by having the value thereof assessed and paying or tendering the amount of the assessment. Such illegal acts of going upon and holding possession of the land, and constructing its road, and erecting buildings thereon cannot change or impair the rights of the land-owner. It is contended that the defendant should have proceeded against the company to recover his damages immediately when the company took possession of the lots. We know of no rule of law which required him to do so. It was the plain duty of the company, if she could not otherwise acquire the right, to proceed to acquire the same by legal appropriation, before taking possession of the lots. Constitution of Indiana, art. I, sec. 21; 1 G. & H. 509, sec. 25; *Graham v. The Columbus, etc., Railway Co.*, 27 Ind. 260. The position that the company may first take possession of the real estate of another per-

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son, and afterwards make that taking legal and rightful by having the damages assessed with reference to the time when the possession was taken, has no warrant in the constitution or laws of this State, whatever may have been the case under the first constitution, or whatever may be the rule in other states of the Union, where the exercise of the right of eminent domain is not restricted as it is in Indiana. With us it is plainly provided in the fundamental law, that "no man's property shall be taken, by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

Having thus found that the railroad company took and has held the possession of the land without right, the next question is, who was the owner of the improvements made on the real estate while it was thus unlawfully held, and should they have been included in estimating the value of the lands in making the assessment? Where one without right or authority, and in his own wrong, makes improvements on the lands of another, to whom do the improvements belong?

It is a maxim of law of great antiquity, that whatever is fixed to the realty is thereby made a part of the realty to which it adheres, and partakes of all its incidents and properties. By the mere act of annexation, a personal chattel immediately becomes part and parcel of the freehold itself. *Amos and Ferard on Fixtures*, 9, and cases cited. The law with reference to the right to remove fixtures under certain circumstances constitutes an exception to this general rule. *Id.* 10; *Hill on Fixtures*, sec. 45.

One who, without license or right, and in his own wrong, has erected a building upon the lands of another, has no right to remove the same. *Washburn v. Sproat*, 16 Mass. 449.

Our statute with reference to the rights of occupying claimants so far modifies the ancient rule, that when an occupant of land has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards, in the proper action, found not to be the rightful owner there-

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of, he may be compensated for his improvements. But this is allowed only in those cases where the party making the improvements had color of title, and made the improvements in good faith. 2 G. & H. 285, sec. 615.

But this right has no foundation in the common law, and is wholly of statutory origin. *Chesround v. Cunningham*, 3 Blackf. 82. But for this statute, one who had in good faith made improvements on the lands of another under the belief that he was himself the owner of it, must loose the improvement, on a recovery from him of the land.

These principles applied to the case under consideration bring us, inevitably, to the conclusion, that if the railroad company, without having acquired the right to occupy the lands in question, in its own wrong erected buildings, etc., on the same, they were the property of Graham, and should have been included in estimating the value of the lands when the damages were assessed.

If this rule seems to savor of hardship, the company has no one to blame but itself, for not having avoided its application.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

W. S. Ballenger, for appellant.

J. B. Julian, J. F. Julian, and G. A. Johnson, for appellee.

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142	259
142	328

EARP v. THE COMMISSIONERS OF PUTNAM COUNTY and Others.

PRACTICE.—Demurrer.—Amendment.—Waiver.—The filing of an amended pleading, after a demurrer has been sustained to the original, is a waiver of any error in the ruling on the demurrer.

COUNTY CLERK.—Record.—Costs.—The statute forbids the clerk from certifying

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any original pleading, after an amended pleading has been substituted; and the Supreme Court can only examine such papers for the purpose of determining the proper person to be taxed with the costs for a violation of the statute.

APPEAL from the Putnam Common Pleas.

BUSKIRK, J.—This was a proceeding to enjoin the commissioners, auditor, and treasurer of Putnam county from purchasing a poor farm and a safe for the use of the treasurer.

The only error assigned is based upon the action of the court in sustaining a demurrer to the complaint. There is no available error presented by the record in this case. The facts as they appear of record are as follows:

The original complaint was filed on the 2d day of March, 1867. On the 25th day of May, 1867, the appellant filed an amendment to the complaint, consisting of an additional paragraph. On the 17th judicial day of the June term, 1867, the appellees filed a demurrer to the complaint, which the court took under advisement until the next term. On the 3d judicial day of the October term, 1867, the cause was continued.

On the 21st judicial day of the February term, 1868, the cause was continued.

On the 4th judicial day of the June term, 1868, the cause was continued.

At the October term, 1868, the demurrer to the complaint was sustained, and the appellant asked and obtained leave of the court to amend the complaint. On the 5th judicial day of said term the following entry is made in the order book, namely:

“Come now the parties by their attorneys aforesaid, and now the plaintiff on motion files his amended complaint herein, to wit (insert), and now the defendants on motion refile the said demurrer to said amended complaint, to wit (insert), which demurrer is by the court sustained, to which judgment of the court in sustaining the demurrer to said amended complaint the plaintiff excepts.”

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Then follows the judgment on demurrer and the prayer for an appeal to this court.

Neither the amended complaint nor the demurrer were copied into the record.

The appellant by amending his complaint waived any objection to the ruling of the court in sustaining the demurrer to the original complaint; and the failure of the clerk or of the appellant to have the amended complaint and demurrer set out in the record renders it impossible for this court to determine whether the court erred in sustaining the demurrer to the amended complaint.

Section 559 of the code, 2 G. & H. 273, provides: "Neither shall the clerk certify any pleading first filed, when there is an amended pleading of the same matter subsequently filed, embracing all the pleadings first filed, and the amendments thereto; but shall certify such amended pleading only."

A large number of the clerks of this State continually disregard the plain and undoubted requirement of the above section, and send up to this court pleading that have been withdrawn or amended and no longer constitute a part of the record. This practice imposes upon litigants a heavy expense, and upon the members of this court the necessity of reading such worthless trash, for such pleadings can not be considered by us for any purpose, unless they shall be examined to determine against whom we shall tax the costs for thus imposing on parties and on this court.

There being no available error in the record, we must affirm the judgment.

The judgment is affirmed, with costs.

M. A. Moore, J. Hanna, and R. E. Smith, for appellant.
S. Claypool, for appellees.

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ACKENBURGH v. MCCOOL.

CONTRACT.—Agency.—Purchase by Agent on his own Account.—Excessive Advancements.—The plaintiff was employed to act as the agent of the defendant in purchasing, prizing, and shipping tobacco to the defendant in New York, and for that purpose the plaintiff was to open a planters' commission business in Newburgh, Indiana, and was to receive seventy-five cents on each hundred pounds of tobacco for prizing, and was to send an account of his fees, with the tobacco, to the defendant at New York, that they might be collected on sale of the tobacco and deducted, so as to require the payment of the same by the planters. The plaintiff was to devote his time faithfully to said business, and comply with all instructions given him by the defendant, and he was to receive and was guaranteed eight hundred dollars for the season. If he could, the defendant was to extend the business to other points, and if successful in so doing, the plaintiff was to have the choice whether he would take the eight hundred dollars, or the seventy-five cents on each hundred pounds prized and shipped from Newburgh and twenty-five cents on all tobacco prized and shipped from other points. Suit was brought by the plaintiff for the eight hundred dollars for his services. Answers were filed in denial, and also alleging that the plaintiff had made excessive advances on tobacco, contrary to instructions, and had used the defendant's money in purchasing tobacco on his own account, and excited the suspicions of planters and prevented the extending of the business to other points, and that he had failed to report his fees for prizing so that the defendant might collect the same; and a counter claim was made against the plaintiff. On the trial, the court instructed the jury, in effect, that, if the plaintiff was shown by the evidence to have entered into the contract set out, and complied with the terms of his contract, and had not elected to take the fees, he was entitled to recover; that if plaintiff purchased tobacco on his own account he was not entitled to the profits thereon unless expressly agreed to by defendant; that if the terms of the agreement prohibited the plaintiff from purchasing tobacco on his own account, he could not maintain the action unless the defendant consented to such purchases, if he suffered injury therefrom; and that if plaintiff had exceeded the limit authorized in making advances on tobacco, he could not recover.

Held, that the defendant could not complain of the instructions.

APPEAL from the Vanderburgh Common Pleas.

DOWNEY, J.—The record in this case is full of transposition, confusion, and strange terminology. After much time spent in its examination, we are not at all certain that we perfectly understand it. Assuming that we do understand it, the case is as follows:

The action was brought by McCool against Ackenburgh,

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and in connection with it there was an attachment and process of garnishment. McCool was successful in the court below, and Ackenburgh appeals. He assigns as errors:

1st. The striking out of the first paragraph of his answer to the amended first paragraph of the complaint.

2d. The striking out of the second paragraph of his answer to said paragraph of the complaint.

3d, 4th, 5th, 6th, and 7th. Refusing to give instructions asked by him, and numbered 1, 2, 3, 4, and 5.

8th. Giving instructions A, B, C, F, and I, and each of them; and

9th. In refusing to grant him a new trial.

Ackenburgh was a commission merchant doing business in New York, and having a general agent in Indiana. Through this agent a contract was made with McCool, by which he agreed to act as agent for Ackenburgh in purchasing, "prizing," and in shipping tobacco to Ackenburgh. The first paragraph of the complaint, as amended, alleges that by the contract McCool was to open a warehouse at Newburgh for the purpose of carrying on a "planters' commission business," for receiving, prizing, and forwarding to the defendant, at his place of business in New York, to be sold by him on account of planters, the defendant charging a commission for selling, all tobacco which should be intrusted to the plaintiff as such agent. The plaintiff was to advance to the owners of such tobacco money, to be furnished by the defendant, as might be agreed upon, the planters to pay the defendant for receiving, prizing, and forwarding the tobacco, seventy-five cents per hundred pounds, to be retained by him out of the proceeds of the tobacco, when sold. The plaintiff was to devote his time faithfully to said business, comply with all the instructions given him by the defendant, and use his best efforts in said business. For his services the defendant agreed to pay him eight hundred dollars, and the defendant agreed that, if he could, the business should be extended to other points, and if he could do so, the plaintiff was to have the choice whether he would take

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the seventy-five cents on the hundred pounds of the tobacco prized at, and shipped from, Newburgh, and twenty-five cents on each hundred pounds of tobacco received and prized at other points, or said sum of eight hundred dollars. This agreement was reduced to writing, and is as follows:

“EVANSVILLE, INDIANA, January 8, 1868.

“I hereby agree with Mr. E. McCool that I will insure him the amount of eight hundred dollars for his season's transactions in tobacco business, and he is to use every effort in his power, according to instructions from me. In the event of my arranging territory for him that will accomplish more profit than the point at Newburgh, and, if they can be secured, a house at widow McCool's, and the house at the Miller settlement, than the above named houses will pay, then it is to be at McCool's choice whether he accepts the amount above named, or receives the profits which will accrue out of the new territory so arranged. I further agree to make every effort to arrange for McCool territory besides that named, which will make the profits reach a greater amount; it being understood that McCool is to receive these profits to himself in case he may make the choice above named.

WM. S. FORD,

General agent for R. H. Ackenburgh.”

It is alleged that the plaintiff performed the contract on his part; but that the defendant failed, on his part, either to arrange for the additional and extended business, or to pay the eight hundred dollars; and that the plaintiff did not elect to take the profits mentioned, of which he notified the defendant; that he has repeatedly demanded of the defendant the said sum of eight hundred dollars, which he has refused to pay; that at the close of the tobacco season, the plaintiff made out and delivered to the defendant a full report of all his transactions, and that the defendant owes him the said sum of eight hundred dollars.

The second paragraph of the complaint is for money had and received by the defendant to and for the use of the plain-

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tiff, being for tobacco consigned to and sold by the defendant for the plaintiff.

The defendant answered to the first paragraph of the complaint, first, that by the contract of agency in said paragraph mentioned and partly set forth, the prizing fee of seventy-five cents per hundred pounds of tobacco received, prized, and forwarded by plaintiff to the defendant, to be paid defendant by his retaining the same out of the proceeds of the sales of the tobacco so shipped and sold as in said paragraph of the complaint alleged, was to be paid to and retained by said defendant out of the proceeds of said sales upon and by virtue of the certificate of said plaintiff of the amount of said prizing fees, of his several shipments of said tobacco; and that said plaintiff, in violation of his said contract, fraudulently failed and neglected to certify the amount of said prizing fees, whereby defendant was prevented from collecting and receiving said prizing fees to a large amount, to wit, the amount of one hundred dollars, and therefore the said plaintiff did not make the sum of eight hundred dollars for his said season's transactions in tobacco, but failed to make the same by his own wrong, and ought not to recover the same.

Second. That the said amended first paragraph of said complaint does not fully set out the terms and conditions of the contract of agency therein mentioned; that by said contract of agency said plaintiff was to be entitled to the said prizing fee of seventy-five cents per hundred pounds on all tobacco received, prized, and shipped by him to defendant during the said tobacco season, in the course of the said agency, the aggregate of which said prizing fees defendant, by his said agreement in writing, made a part of said paragraph, insured said plaintiff would amount to eight hundred dollars for his season's transactions in said tobacco business; that by said contract of agency the said plaintiff agreed to charge said prizing fee to the planters and owners of said tobacco so received, prized, and shipped by him, and certify the amount thereof on each of said shipments to the said

defendant, to be by him retained out of the proceeds of sales of the same, and placed to the credit of said plaintiff until the said plaintiff should make choice between the amount of eight hundred dollars, and the profits mentioned in said written agreement; and defendant alleges that the said plaintiff failed to comply with the said terms and conditions of said contract of agency, by fraudulently failing and neglecting to charge said planters and owners of said tobacco so received, prized, and shipped by him with said prizing fee; and by fraudulently failing and neglecting to certify to defendant the amounts of said prizing fees on the several shipments of tobacco made by him to defendant; whereby the said defendant was prevented from collecting and retaining prizing fees on said tobacco so received, prized, and shipped by plaintiff, and sold by defendant, to the amount of one hundred dollars; and therefore, defendant says that said plaintiff by his own violation of his said contract of agency, and wrong, failed to make said sum of eight hundred dollars for his season's transactions in said tobacco business, and ought not to recover upon said paragraph.

Third. That the defendant was prevented from arranging territory for the plaintiff which would yield a greater sum than eight hundred dollars, and from arranging for the plaintiff, besides Newburgh, widow Mrs. McCool's, and the Miller settlement, which would make the profits of said agency reach a greater amount, whereby the plaintiff might have had an opportunity to take an amount greater than the eight hundred dollars in case he elected to do so, by the plaintiff's violating his said contract of agency in speculating in tobacco on his own account, and shipping the same with the tobacco intrusted to him as the agent of defendant, and thereby exciting the suspicions of the planters and owners of tobacco so intrusted to him, and of their neighbors, and others owning tobacco in the vicinity of said widow McCool's and the Miller settlement, and throughout the said county of Warrick generally; and that by means of said wrongful acts and doings, the business of said agency was

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greatly injured and decreased, and defendant damaged to a large amount, to wit, to the amount of two thousand dollars; wherefore defendant demands judgment against said plaintiff for said sum of two thousand dollars, as a counter claim against said plaintiff, and for other proper relief.

To the second paragraph of the complaint the defendant answered, first, admitting the consignment to him of the tobacco by the plaintiff, and the sale thereof by him, and that he had received the proceeds, four hundred and seventeen dollars and sixty-five cents, which had not been paid; but alleging that said tobacco was purchased and shipped by said plaintiff to said defendant during said tobacco season, for which the said plaintiff contracted to act as the agent of the defendant in the planters' commission business, at Newburgh, Indiana, as in said first paragraph of the answer alleged, and was paid for by said plaintiff with the money furnished by defendant to him as such agent for the purpose of making advances to such planters and others as would through him, as said agent, ship their tobacco to defendant at New York, to be by him sold on commission on account of said planters and others, in violation of his said contract of agency and of the printed instructions to plaintiff.

The second paragraph is set-off, alleging that the plaintiff is indebted to the defendant in the sum of seventeen hundred and three dollars, for so much money by said plaintiff had and received to and for the use of said defendant, etc.

There is another counter claim, in which it is alleged that the defendant furnished to the plaintiff seventeen hundred and three dollars, to be advanced on tobacco, and that the plaintiff failed to advance it in that way, but converted it to his own use.

There is also a general denial of the whole complaint.

Issue was taken on the paragraphs of the answer, but exactly how it was done we cannot ascertain from the record. One paragraph of the reply denies each and every allegation of the complaint.

There was a trial by jury, and verdict for the plaintiff, motion for a new trial overruled, and judgment on the verdict.

With reference to the first and second assignments of error, that is, the striking out of the first and second paragraphs of the answer to the amended first paragraph of the complaint, we may dispose of them by saying that so far as the record is concerned, the grievance is wholly imaginary. No such action of the court appears in the record. But if they had been stricken out, we could not consider the question without a bill of exceptions bringing the question before us. *Fisher v. Ewing*, 30 Ind. 130.

The technical meaning of the word "prize" is thus explained by the witnesses, and stated in the brief of appellant's counsel:

The mode of conducting the planters' commission business is fully explained by the evidence. Tobacco of fifty different planters is bulked separately in the same warehouse at the same time. It is necessary that each hogshead should contain the same quality and character of tobacco. But the same character of tobacco in a quantity sufficient to fill a hogshead, will not ordinarily be found in a single crop of tobacco. It thus becomes necessary to select tobacco of like character from tobacco owned by other planters. And that each planter may get the proceeds of his own tobacco, the quantity owned by each is carefully weighed, then prized into the hogshead, and a certificate of the quantity owned by each person is sent with the number and mark of the hogsheads to the principal in New York. By this system of doing business it becomes the principal duty of the agent to certify to the principal the quantity, quality, and ownership of every pound of tobacco prized into each hogshead, in order that, when that hogshead is sold at New York, each planter may have credit for the proceeds of his part of the hogshead, and be charged with his proportion of the expenses on each hogshead, including, of course, the prizing fee of seventy-five cents per one hundred pounds.

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The instructions which it is alleged the court improperly refused to give are as follows:

"1. If the jury believe from the evidence, that the contract between the plaintiff and defendant prohibited the defendant from speculating in, or purchasing tobacco on his own account, and that he violated said contract in this particular, he cannot recover on the guarantee sued on in this action."

"2. If the jury believe from the evidence, that the plaintiff exceeded the limit prescribed by the defendant, in making advances to the owners of tobacco, in violation of his contract, he cannot recover upon the guarantee sued on."

"3. If the jury believe from the evidence, that the defendant guaranteed the plaintiff \$800 for his season's transactions as agent of the defendant in the tobacco business, and that plaintiff was required by said contract to charge and certify to defendant the prizing fees on the several crops or lots of tobacco, forwarded by plaintiff to defendant, to enable the latter to retain the same out of the proceeds of said crops or lots, and that plaintiff failed to certify and so charge said prizing fees, the plaintiff ought not to recover upon the said guarantee."

"4. If the jury believe from the evidence, that the plaintiff purchased the tobacco mentioned in the second paragraph of his complaint, or any part thereof, during the time he was acting as agent of the defendant, or with the money of the defendant, all profits from any such purchase beyond the compensation agreed upon belong to the defendant, and plaintiff cannot recover the same in this action."

"5. If the plaintiff was the agent of the defendant for an agreed compensation, all the profits made by him in the business beyond said compensation are for the benefit of the defendant, and plaintiff is not entitled to recover them in this action."

The instructions given, including those to which the defendant excepted, and which are referred to in the motion for a new trial, are as follows:

"A. The plaintiff in this action seeks to recover upon a certain contract, which he charges to have been made between

the parties, in which he charges that defendant guaranteed that the plaintiff would realize eight hundred dollars, and claims from defendant eight hundred dollars upon such guarantee; and in order to entitle the plaintiff to recover the eight hundred dollars, you must be satisfied from a preponderance of the evidence, that the parties made the contract set up in the complaint, and that the plaintiff fulfilled all the obligations of such contract on his part to be performed, according to such instructions as he received from plaintiff or his agent, Ford; and if you find from the evidence that the agreement set out in the complaint is the contract made between the parties, and that plaintiff did comply with said agreement, and perform all the obligations of such agreement on his part to be performed, according to the instructions he received, and that plaintiff did not elect or choose to take any portion of the profits for his services instead of the eight hundred dollars, the plaintiff will then be entitled to recover the eight hundred dollars and interest thereon, from the time when such tobacco season is shown by the evidence to have closed.

"But if, on the other hand, the contract made between the parties was another and different contract from that set out in the complaint, or the plaintiff failed to perform any of the obligations of said contract, on his part to be performed, according to the instructions which were given him, then the plaintiff cannot recover said sum of eight hundred dollars, upon such guarantee, or any part thereof."

"B. In relation to the other claim set up by the plaintiff for the net proceeds of tobacco charged to have been purchased by plaintiff on his own account, if you are satisfied from the evidence that plaintiff was acting as agent of defendant for a fixed compensation, and that he made certain purchases of tobacco on his own account, even though you should find that such purchases were made with the consent and approbation of defendant, yet the profits arising from such purchases would belong to defendant, unless it was agreed and understood that such purchases were to be made for the benefit of

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plaintiff; but if, on the other hand, you are satisfied that it was agreed and understood that whatever profits might arise from such purchases were to belong to plaintiff, then the plaintiff will be entitled to recover the net proceeds of such purchases."

"C. If the jury believe from the evidence, that the contract between the plaintiff and defendant prohibited the plaintiff from speculating in, or purchasing tobacco on his own account, and that he violated said contract in this particular, he cannot recover upon the guarantee sued on in this action, unless said purchases on his own account were made with the consent and approbation of the defendant, if it appear that injury resulted therefrom."

"D. If the jury believe from the evidence, that the plaintiff exceeded the limit prescribed by the defendant, in making advances to owners of tobacco, in violation of his contract, he cannot recover upon the guarantee sued on."

"E. If the jury believe from the evidence, that defendant guaranteed the plaintiff eight hundred dollars from his season's transactions, as agent of defendant in the tobacco business, and that plaintiff was required by said contract to charge and certify to defendant the prizing fees on the several crops or lots of tobacco forwarded by plaintiff to defendant, to enable the latter to retain the same out of the proceeds of sale of said crops or lots, and that plaintiff failed to so charge and certify said prizing fees, the plaintiff ought not to recover upon said guarantee."

"F. If the jury believe from the evidence, that the plaintiff purchased the tobacco mentioned in the second paragraph of his complaint, or any part thereof, during the time he was acting as the agent of the defendant, or with the money of the defendant, all profits from any such purchase, beyond the compensation of plaintiff agreed upon, belong to the defendant, and plaintiff cannot recover the same in this action, if it appears that injury resulted therefrom, unless it was agreed that such purchases were to be made for plaintiff's benefit."

"G. If the plaintiff was the agent of defendant for an agreed compensation, all profits made by him beyond said compensation, are for the benefit of the defendant, and plaintiff is not entitled to recover them in this action, unless the evidence shows that such profits were, by agreement, to belong to the plaintiff."

"H. The court instructs the jury that if they believe from the evidence, that the parties made the contract set out in the complaint, and that the plaintiff, Emery McCool, complied with the contract set out in his complaint, and that he never chose nor elected to take any part of the profits for his services, then he would be entitled to recover on the written guarantee the sum of eight hundred dollars, together with the interest from the close of the season's transactions, without regard to the number of hogsheads of tobacco received. The court instructs the jury that, if they believe from the evidence, that the plaintiff purchased with his own money and means a part of the tobacco in the second paragraph of the complaint mentioned, and the balance with the knowledge, consent, and approbation of the defendant, the defendant advancing him money on the purchase, then the plaintiff would be entitled to recover the net proceeds of the sale, as shown by the account sales made out by the defendant and given in evidence."

"I. Although the jury believe that the plaintiff bought tobacco during the time he was acting as agent, yet, if he did it with the knowledge and consent of the defendant's agent, it would not be a violation of his instructions, and would be no cause of defence against the plaintiff's guarantee to pay the eight hundred dollars."

Without expressing any opinion as to the correctness of the first, second, and third charges asked and refused, we are of the opinion that they, and also the fourth and fifth charges asked and refused, which seem to be correct, are fully embraced in the charges given by the court, which are above set out.

While it seems to us that the plaintiff might well object to

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some of the charges given, we do not think that the defendant has any good ground to complain of them.

It cannot be expected that upon any mere conflict in the evidence, such as is referred to by counsel for appellants, we will disturb the judgment.

Judgment affirmed, with costs and three per cent. damages.

J. F. Chandler and *A. Dyer*, for appellant.

J. M. Shackelford and — *Parrett*, for appellee.

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MORTGAGE.—Foreclosure.—*Answer of want of Title in Mortgagor.*—In an action to foreclose a mortgage, the defendant answered, that at the time of the execution of the mortgage to the plaintiff, he, the defendant, had no title to the premises mortgaged, and that he had no title to the same at the time of filing said answer.

Held, that the answer was bad.

PLEADING.—Contract.—Construction.—Reformation.—Where in a paragraph of pleading it is sought to have a contract construed, and where it is sought, if the court does not place a particular construction upon it, which is averred to have been in accordance with the intention and understanding of the makers, then to have such a reformation of the contract as shall render it susceptible of such an interpretation, the contract must be stated in full, with all material exhibits.

SAME.—Copy.—Performance of Contract.—Where, in a pleading, a written contract is relied upon, the instrument must be fully set out, that the court may know what its terms are; and if the contract provide that under certain conditions there may be a partial rescission of the contract, all that such conditions required on the part of the pleader demanding rescission must be alleged to have been performed, or an excuse must be given for the omission.

APPEAL from the Warren Common Pleas.

PETTIT, J.—This suit was brought by the appellee against the appellants on a promissory note, and to foreclose a mortgage given to secure its payment. The note and mortgage were given to Jonathan Shidler and assigned to Henry Shidler, the appellee, and are made parts of the complaint.

There was a demurrer to the complaint for want of sufficient facts, which was overruled, and exception was taken; and this ruling is assigned for error. The appellants have not, in their brief, noticed this assignment, or attempted to point out any defect in the complaint, nor have we been able to discover any. It is in the usual form, and with the usual and proper prayer.

The third, fourth, and fifth paragraphs of the answer are, in substance, as follows:

Par. 3. Failure of consideration, in this: that the note was given in part payment for the Attica Flouring Mills, purchased of Jonathan Shidler; that the defendants purchased said mill under the following written contract:

"This is to certify that John Fallis and Nathan Plowman have this day bought of Jonathan Shidler his certain flouring mill, situated in the town of Attica, Indiana, upon the following terms, viz.: The said Fallis and Plowman, hereby agree to pay said Shidler, for said mill property, the sum of ten thousand and forty dollars, in the following payments and upon the following terms and conditions, to wit: five hundred dollars, in cash, to be paid in sixty days from date; twenty-five hundred and forty dollars, which is now secured by mortgage to Purden, to be assumed, and said Shidler to be released entirely from all obligation on said mortgage in one year from date; one thousand five hundred dollars to be paid in town property in the town of Lodi, consisting of Plowman's dwelling house and six lots, as originally laid out on said town plat, and Plowman and Verdin's addition to said town; one thousand dollars to be paid in one year from the first of August next, subject to said Shidler's order, not to exceed one hundred dollars per month, except by taking up receipts for wheat now stored in the mill, but in case of a failure of water, then the time to be extended equal to the time of the failure of said water; two thousand two hundred and fifty dollars to be paid by a sale and conveyance of certain tracts or parcels of land in White county, Indiana, belonging to James P. Ellis, or certain property in Lafayette,

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belonging to said Ellis, said Shidler to make his election of said property by the first day of April next; but the conveyance of the aforesaid lands is made upon the express condition that a supply of water is continued in the Wabash and Erie canal sufficient to run said mill in accordance with the terms of the lease from the trustees of said canal to said Shidler; and in case of the failure of the supply of said water in said canal, as aforesaid, within two years, then the lands or town property, to the value of two thousand two hundred and fifty dollars, as last described, shall revert back to said Fallis and Plowman, or Ellis, the present holder of the property; or in case the said Shidler desires to sell said property, he is to have the privilege of doing so, upon the condition that he execute to said Fallis and Plowman a good personal or real estate security conditioned for the refunding of said two thousand two hundred and fifty dollars upon the failure of the water as aforesaid; and the further sum of two thousand two hundred and fifty dollars to be paid said Shidler at the expiration of three years from the first of August next, upon the aforesaid condition that a supply of water is continued in said canal, in accordance with the terms of the lease from the trustees of the Wabash and Erie Canal as aforesaid; this payment to bear interest from date, and the interest to be paid annually, which interest said Shidler agrees to refund to said Fallis and Plowman in case of a failure to supply water as hereinbefore provided.

"And, it is further agreed, that if the water should fail in said canal, and the conditions of the lease from the trustees to said Shidler should be broken by such failure of water, and in case of such failure to supply said water to said Fallis and Plowman, and the last two payments aforesaid should thereby become forfeited, or either of them, then and in that case, said Fallis and Plowman agree to transfer to said Shidler said mill property, upon his refunding or securing to them all the payments made upon said property, and also paying him the sum of four hundred dollars per annum as rent for

the time said Fallis and Plowman shall have used said property.

"And it is further agreed, that possession of said mill shall be given on the first day of April, and that all the conveyances and writings herein contemplated shall be executed at that time.

"And it is further agreed, that to secure the deferred payments on said mill property, the said Fallis and Plowman shall execute to said Shidler a mortgage upon said mill property.

"In witness whereof, the said parties have hereunto set their hands, this 15th day of March, 1859.

JONATHAN SHIDLER,

NATHAN PLOWMAN,

JOHN FALLIS."

In this paragraph it is stated that the mill had the capacity sufficient to manufacture seventy-five barrels of flour per day, and that by the terms of said contract the defendants were to be supplied with sufficient water to run said mill; that there was no water in the canal at the time the defendants purchased the mill under said contract, and that they relied on said contract; that the water power was worthless, and the mill was of no value; that defendants complied with their part of said contract; that Jonathan Shidler failed, and still fails, to comply with his part of the contract; that soon after making the said contract, Jonathan Shidler became insolvent, and the defendants retained said mill as their security; that at the date of the purchase the mill was of the value of five thousand dollars; that they have already paid eight thousand dollars. Prayer, for reformation of the contract and for costs.

Par. 4. Defendants aver that it was mutually agreed and understood by the parties to the contract above set out, that the said Jonathan Shidler was to furnish a sufficient supply of water to run the Attica Flouring Mills, for which, as part consideration, the note sued on was given; and that if said contract fails to fully express said idea, the same is a mistake, and does not set forth the contract of the parties thereto; that the water power having failed, the consideration

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of the note had failed; that without said water power the property was only worth five thousand dollars, and defendants have already paid eight thousand. "Wherefore the defendants pray that, should the court construe said contract otherwise than as the same was intended by the parties thereto, as above alleged, defendants be permitted to prove the mutual understanding of said parties, as above alleged, and reform said contract."

Par. 5. The defendants say that when they gave the mortgage they had not, nor have they ever had, any title to the mortgaged property.

The third, fourth, and fifth paragraphs of the answer were demurred to, for want of sufficient facts, etc. The demurrers were sustained, and exceptions taken, and the ruling presents the remaining questions for consideration.

We will reverse the order of these answers, in their consideration.

The fifth paragraph alleges that at the date of the mortgage, the defendants had not, nor have they at any time since had, any title to the mortgaged property. This answer is merely trifling, and deserves no further notice than to say that it was bad, and the demurrer was properly sustained to it.

As to the fourth paragraph of the answer, while we fully admit and hold that a plaintiff or defendant may have a paper, properly pleaded in a case with proper averments, reformed so as to meet or avoid fraud or mistake, yet we must hold this paragraph bad, for the following reasons: first, this paragraph does not set out the contract sought to be construed or reformed, but refers to it thus: "the defendants aver that it was mutually agreed and understood by the parties to the contract above set out, that the said Jonathan Shidler was to furnish a sufficient supply of water to run the Attica Flouring Mills." The words "above set out," refer to the contract in the third paragraph, and that refers to a lease from the trustees of the Wabash and Erie Canal as governing and regulating the quantity of water which was

to be furnished to said mill, but that lease is not set out in the record. It formed a part of the contract set out in the third paragraph, and necessarily a part of the contract referred to in the fourth paragraph, and which is sought to be reformed, if it needs reformation, if in the judgment of the court it does not already contain the alleged intention of the parties. A contract sought to be reformed must be in all its parts before the court, in order that it may be construed as a whole, to determine its meaning and see whether it does not already express the meaning and intention claimed for it, and whether it needs or is susceptible of reformation. This answer does not allege that the contract needs, nor does it ask that it shall be reformed, unless the court shall fail to construe it in a certain way. This the court could not do without all the parts before it. The possibility of the failure of the water was in contemplation when the contract was made, and the parties saw proper to specifically provide for such a contingency in the contract, and have by their agreements fixed the rights and liabilities of each upon the happening of that contingency, by reversions, reconveyances, payment of rents, etc., and it is not for the courts to substitute other provisions instead of those made by the parties where no fraud or mistake is alleged as to such provisions.

As to the third paragraph, we hold that it is bad for the following reasons: It does not bring or place before the court the whole of the agreement upon which the defendants say they relied in making the purchase; the lease from the trustees of the Wabash and Erie Canal forms a necessary part of the written contract, because it is referred to as showing and governing what supply of water was contracted for. The averment that the mill had sufficient capacity for the manufacture of seventy-five barrels of flour per day is not an averment that Shidler, as the lessee of the trustees of the canal, contracted to furnish the amount of water necessary for that purpose. The answer alleges that there was no water in the canal at the time of the purchase, and in consequence of this the defendants relied on the contract; the

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whole of the contract in all of its parts not being in the answer, it fails to show upon what contract they relied. When a contract or paper is made a part of a pleading, and the pleader avers that its provisions were relied upon, he must present the whole of the contract, so that the court may see upon what he relied. The contract, or that part of it which is set out in this paragraph of the answer, shows that in case of the failure of water, the appellants were to surrender the property, paying a rental therefor of four hundred dollars per annum. They expressly say that they did not comply with this part of the agreement, because Jonathan Shidler became insolvent. This could not excuse them from complying or offering to comply with this part of the contract, without an averment that Shidler had parted with the property that was to be reconveyed in the case of the failure of water, and that he had failed to give the security as provided by the contract.

It is assigned for error that the court overruled the motion for a new trial. The evidence is not in the record, nor is there any bill of exceptions showing any irregularity on the trial; we must, therefore, presume that the motion was properly overruled.

The judgment is affirmed, at the appellants' costs, with two per cent. damages.

M. M. Milford, for appellants.

J. Buchanan, for appellee.

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RECORD.—*Clerk*.—Where one pleading is substituted for another, the clerk should not copy the original into a transcript of the record. Where the clerk is in doubt what papers form a part of the record, he should demand from the attorney for the appellant written directions and append the same to the

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142 259
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142 441
143 71

31 490
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record, to enable the Supreme Court to tax with costs the party liable for incumbering the transcript.

SAME.—*Judgment on Default.*—When the judgment is rendered upon default, the clerk should certify the summons and return, or the affidavit of non-residence and proof of publication. If the defendant appear, neither of these papers should be copied.

PRACTICE.—*Withdrawal of Pleading.*—When an answer has been filed and a demurrer sustained to one paragraph thereof, and a reply filed to other paragraphs, the plaintiff should take leave to withdraw his pleadings, before filing an amended complaint.

SAME.—*Demurrer.—Waiver.—Transcript.*—When a demurrer has been sustained to a pleading, an amendment thereof waives any error in the ruling on the demurrer, and the original pleading is not part of the transcript. A party, to render the ruling on the demurrer available, must stand on his pleading.

SAME.—*Submission.—Issue of Law Undisposed of.*—It is erroneous to submit a case for trial while a demurrer remains undisposed of, but the attention of the court must be called to the error by a motion for a new trial or in arrest of judgment.

SAME.—*New Parties.—Bill of Exceptions.*—After the submission of a case for trial, a motion to admit new parties cannot be granted until the submission is set aside; and the ruling on such a motion can only be presented in the Supreme Court by a bill of exceptions.

SAME.—*Submission Set Aside.*—After the submission of a cause, if it be discovered that an issue of law is undisposed of, the submission should be set aside.

SAME.—*Rejection of Pleading.*—Where, on motion, a reply is rejected, the ruling should be brought to this court by bill of exceptions, to avail the appellant.

SAME.—*Re-submission.—Waiver.*—Where parties by agreement submit a cause, which is already under submission for trial, any error in not having the former submission set aside is waived.

SAME.—*Defective Finding.—Judgment.*—Where judgment is rendered on a finding which does not cover all the issues, and no exception is taken to the form and character of the judgment when announced, and no motion is made after judgment has been rendered and entered on the order book, to correct it or set it aside, no available error can be assigned thereon in this court.

SAME.—*Affidavit.—Transcript.*—Affidavits to set aside a submission are not part of the transcript, unless made so by bill of exceptions or order of court and directed to be certified.

SAME.—*Judgment.—New Party.*—After judgment, a new party cannot be made to the action except a new trial be granted.

SAME.—*Bill of Exceptions.*—A bill of exceptions may be general, embracing everything that has been made a part of the record by bill of exceptions; or it may embrace but one question. The complaint, answer, reply, demurrers, all proper entries made by the clerk, and the process, where there has been judgment on default, are parts of the record to be certified without a bill of exceptions. The record, when filed on leave of court within a time limited, must

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show a filing within the time given. The clerk should copy in their proper order, the papers referred to where it is marked in the bill of exceptions "(here insert.)." Where the bill of exceptions shows on its face that it does not contain all the evidence, where it should do so, it will not be considered upon the question of evidence.

SAME.—Assignment of Error.—Where it is assigned as error that the court overruled a motion for a new trial or in arrest of judgment, these assignments include all the reasons for a new trial or in arrest embraced in the motion. A ruling upon demurrer must be assigned for error. So, also, where there was no demurrer to the complaint, and the question as to its sufficiency or as to the jurisdiction of the court is to be raised in the Supreme Court, it must be done by assigning the error upon the record.

APPEAL from the Grant Circuit Court.

BUSKIRK, J.—This was an action by the appellant against the appellees to recover the possession of certain leather and hides, which he claimed to own and was entitled to the possession, and which he alleged were wrongfully and unlawfully detained by the appellees. After the record in this case was filed in this court, the death of Henry Pierce was suggested, and the administrator of his estate, Cimon Goldthait, was substituted as appellee.

The transcript in this case is a legal curiosity, and should be, in some form, perpetuated for the information of those who may hereafter be charged with the administration of justice. It is a matter of profound wonder and astonishment how so many mistakes could be crowded into a record of only twenty-three pages.

The transcript commences by setting out the complaint, affidavit, writ of replevin and return thereon, and bond. There does not seem to have been any summons issued or served on the defendants.

It is next recited that a rule was entered against the defendants to answer, and in discharge of such rule the defendants filed an answer, "in these words." The clerk has included in brackets these words: "[not on file]." A rule is entered for a reply. On the fifth judicial day, the plaintiff demurred to the third and fourth paragraphs of the answer, and replied to the first and second. The demurrer was sustained to the fourth and overruled as to the third, and each party took an exception.

At this stage of the proceedings, the plaintiff asked and obtained leave to amend his complaint. There was no withdrawal by the parties or setting aside by the order of the court, of the answer, demurrer, ruling of the court thereon, or the reply, as there should have been.

The plaintiff then filed a substituted complaint, which is set out at full length. The substituted complaint was not sworn to, but no objection seems to have been taken for this omission.

The defendants then demurred to the complaint, which demurrer was overruled, and an exception was taken. The defendants then filed an answer in four paragraphs.

Thereupon the plaintiff filed a demurrer to the second paragraph of the answer, and at the same time moved to set aside the execution; and before any action was taken on the demurrer or motion, the plaintiff further moved to strike from the second paragraph of the answer the execution therein referred to, together with the levy thereon, for the reason that said execution was unauthorized and void.

The court sustained the demurrer, to which ruling the defendants excepted, and took leave to amend by filing an additional paragraph of answer. The defendants thereupon filed an additional paragraph, which was numbered five.

The plaintiff then filed a demurrer to the fifth paragraph of the answer.

The plaintiff then filed a denial to each paragraph of the answer. The court, without making any ruling on the demurrer or motion to strike out, continued the case, with leave to the parties to amend their pleadings.

At the next term of the court, the following entry was made on the order book in this cause.

"Come now the parties, and this cause, being at issue, is, by the agreement of parties, submitted to the court for trial, on complaint, pleadings, proof and argument of counsel, and the court, not being sufficiently advised, takes time to deliberate, and this cause is continued until the next term of the court."

At the next term of the court, Hiram Brownlee moved the court to be made a party, and filed his written application, which the clerk has copied into the record. The court overruled the motion, and Hiram Brownlee excepted, but no bill of exceptions was filed. We are next informed that the court sustained the demurrer which had been filed to the fifth paragraph of the answer twelve months before, to which defendants excepted; and thereupon the plaintiff filed a reply to the fifth paragraph of the answer, which is set out at full length.

Thereupon the defendants moved the court to strike out and reject the reply to the fifth paragraph of the answer. The court sustained the motion, and the plaintiff excepted, but the question was not reserved by a bill of exceptions.

The following entry is then copied into the transcript, namely:

"And this cause, being at issue, is submitted to the court for trial, and the court, after hearing all the evidence and argument of counsel, and due deliberation had, finds for the defendants as to one hundred and eighty dollars, and the said plaintiff is ordered to pay into court, for the benefit of Henry Pierce, one of said defendants, the sum of one hundred and eighty dollars. And it is ordered and adjudged by the court that defendants recover of and from said plaintiff said sum of one hundred and eighty dollars, together with the costs herein, taxed at \$——. And the said plaintiff now prays an appeal to the Supreme Court, which the court grants and now allows to plaintiff ninety days to perfect and file bill of exceptions."

We are next informed that Hiram Brownlee, after the rendition of the above judgment, filed his written application to be admitted as plaintiff, and that after the payment of the mortgage mentioned in the complaint, the surplus should be decreed to be paid to him as the assignee in bankruptcy of William S. King, which motion was overruled, and the court gave, among other reasons for overruling the said motion, that said cause had been submitted at last term

of said court, when the evidence was heard and argument made. Thereupon, the plaintiff moved to set aside said submission, and in support thereof filed an affidavit, when one of the attorneys for the appellees filed an affidavit in opposition to the one filed by the attorney of the appellant. These affidavits are copied into the record by the clerk. The court overruled the said motion, and the clerk has copied into the record the reasons given by the court for refusing to set aside the submission. The case seems to have taken a new growth at this point, for we are next startled with the following entry: "It appearing that the reply to the fifth paragraph of defendants herein demurrer has been sustained, plaintiff, by leave, files his reply to the fifth paragraph of defendant Pierce's answer (here insert reply filed October 15th, 1869), which reply said Pierce moves to reject, which motion is sustained, and the said paragraph rejected, to which plaintiff excepted at the time. The parties, by agreement, then offered the following additional evidence." Then follows what purports to be some oral testimony, and some detached portions of the record in a suit wherein defendant Pierce had been plaintiff, and the said William S. King had been defendant; the balance had been lost. The history is very frequently interspersed with entries of this sort: (here insert), (which is lost), (not on file), (return not recorded), (the same was used as evidence before being recorded, Clerk), (which was not all the evidence in said cause, Clerk). Then follows the motion and reasons for a new trial, and overruling of such motion, and exception by plaintiff.

We are at this stage of the proceedings first reminded that this was intended as a bill of exceptions, by the following statement: "Plaintiff asks that this, his bill, be signed and made a part of the record, which is done this — day of December, 1869," and which was signed by the judge.

The clerk, after repeatedly stating in transcript that the record was imperfect and defective, finally certifies under his hand and seal of office, that the foregoing was "a full, true, correct, and complete transcript of the record of the pro-

ceedings and judgment of said court in the above entitled cause."

The following are the errors assigned: first, said court erred in rendering said judgment in favor of Pierce against said appellant, both as to costs and the judgment of said one hundred and eighty dollars, all of which said appellant avers was contrary to law and evidence; second, the court erred in overruling plaintiff's motion for a new trial; third, said finding and judgment is contrary to law and the evidence; fourth, the court erred in not allowing assignee of King to be made defendant.

There is also the following indorsed on the record:

"Comes now Hiram Brownlee, assignee of said King, who avers that said court erred in not allowing him to be made a party to said cause. Said court erred in ordering said money to be paid to said Pierce instead of to said assignee, for which said Hiram Brownlee asks that said cause be reversed.

HIRAM BROWNLEE, assignee of

W. S. KING."

We have thus gone through the record in this case for the purpose of making some practical suggestions that may be of service to the profession and to clerks. The practice in this court is very plain and simple, and readily and easily understood, and yet the conviction has been frequently forced upon us, that attorneys, that we know are sound lawyers, able advocates, and successful practitioners in the lower courts, have not rendered themselves familiar with the rules of practice in this court, and consequently present their cases here in so imperfect and defective a manner that we are forced to decide against them when the justice and merits of the cases are with them.

We will now point out what we regard as defects and errors in this record.

The clerk copies the original and substituted complaint. This is wrong, and against the plain and undoubted require-

ments of the statute. It is provided in section 549 of the code, 2 G. & H. 273:

"Neither shall the clerk certify any pleading first filed, when there is an amended pleading of the same matter subsequently filed, embracing all the pleading first filed, and the amendments thereto; but shall certify such amended pleading only."

The attention of counsel and clerks has been repeatedly called to this section, by this court, and yet the statute is continually disregarded. This imposes great expense upon litigants, and unnecessary labor on the members of this court.

It is provided by section 548, of the code, that the appellant may direct, in writing, what portions of the proceedings shall be certified. Whenever a clerk is in doubt as to what he should put in the record, he should require the appellant or his attorney to give him written directions, and should follow such directions, and append the same to the transcript as is provided in section 548.

The latter clause of section 549 reads as follows: "If the clerk should certify matter not material to the determination of the appeal, the Supreme Court may direct the person blamable therefor to pay the costs thereof."

The evil has become so great that we will be compelled to exercise the power vested in us by the above clause, unless there is a closer adherence to the statute.

Second. The clerk copied into the record the writ of replevin, and if there had been a summons issued as required by law, we presume it would have been copied. This should not have been done. By section 549 of the code, a summons does not constitute a part of the record when the defendant appears to the action, but where the defendant does not appear, and there is a judgment by default, then the process, whether by summons or publication, becomes a part of the record; and in making out a transcript in such case, the clerk should copy the summons and return, or the affi-

davit of non-residence, the notice, and proof of publication. *Ewing v. Ewing*, 24 Ind. 468; *Abdil v. Abdil*, 26 Ind. 287; *Cochnowar v. Cochnowar*, 27 Ind. 253; *Shields v. Cunningham*, 1 Blackf. 86; *Hays v. M'Kee*, 2 Blackf. 11.

Third. After an answer had been filed, and a demurrer had been sustained to one paragraph and a reply filed to two other paragraphs, the court permitted the plaintiff to file a substituted complaint. The correct and better practice would have been for the plaintiff to have asked leave of the court to withdraw his demurrer and reply, for the purpose of amending his complaint. If leave was granted, then the answer should have been withdrawn or stricken out by the court. But the amendment of the complaint, without withdrawing the subsequent pleadings, would supersede such pleadings, and they would have to be refiled or substituted by some other pleadings.

Leave might be granted to file an additional paragraph of the complaint, after an answer had been filed to the original complaint, without creating confusion, but it is otherwise where a substitute complaint is filed.

Fourth. When the court sustained the demurrer to the second paragraph of the answer, the defendants excepted and at the same time asked and obtained leave to amend such pleading. The amendment of a pleading to which a demurrer has been sustained waives any objection to the action of the court in sustaining the demurrer. To render an exception to the action of the court in sustaining a demurrer available, the party must stand upon his pleadings. *Cross v. Truesdale*, 28 Ind. 44.

Fifth. When this cause was first submitted to the court for trial, there was pending, undecided, a demurrer to the fifth paragraph of the answer. This was erroneous. *Gray v. Cooper*, 5 Ind. 506; *Waldo v. Richter*, 17 Ind. 634; *Anderson v. Weaver*, 17 Ind. 223; *The Cincinnati and Chicago Railroad Co. v. McFarland*, 22 Ind. 459; *King v. The State*, 15 Ind. 64; *Perrin v. Johnson*, 16 Ind. 72; *Kegg v. Welden*, 10 Ind. 550.

But it was decided by this court in *Haun v. Wilson*, 28 Ind. 296, that going to trial of questions of fact while there was pending an issue of law, was such irregularity in the proceedings of the court as would be cause of reversal, if it was brought to the attention of the lower court by a motion for a new trial or in arrest of judgment, but if it was not thus assigned for a new trial or in arrest, it would be waived. Such is the condition of this cause, as such irregularity was not assigned for a new trial or in arrest of the judgment. No error can be assigned on it in this court.

Sixth. At the next term of the court, Hiram Brownlee filed his written application to be made a party.

This could not have been done until the submission of the cause had been set aside, but the matter is no part of the record. It could only be made such by a bill of exceptions.

Seventh. At the fall term of the court, this cause was submitted to the court for trial, and the evidence was heard, and argument had. At the next term of the court, without setting aside the submission, and before a finding was announced, the court announced a ruling on the demurrer that had been filed two terms before to the fifth paragraph of the answer. This was irregular. The court should have set aside the submission as soon as it was ascertained that there was an issue of law pending and undecided.

Eighth. The record shows that the court sustained the demurrer to the fifth paragraph of the answer, to which the defendants excepted. The record then shows that the plaintiff filed a reply to the fifth paragraph of the answer, being the same to which the demurrer had just been sustained. We presume that the court overruled the demurrer, and the clerk has got the entry wrong.

Ninth. The defendants moved to reject the reply, which motion was sustained, and the plaintiff excepted; but as the matter is not presented by a bill of exceptions, no error can be assigned on such ruling.

Tenth. The parties again submitted the cause to the court for trial, without having set aside the former submission; but

as this was done by agreement and without objection, any error that might exist is waived.

Eleventh. The finding and judgment of the court do not cover all the issues in the cause. It is alleged in the substituted complaint, that the appellant, being the security of William S. King on several notes, amounting to the sum of \$—, executed a mortgage to him on the property in controversy, to secure him from loss; that he had been compelled to, and had paid said notes as such security; that the defendant Pierce had, subsequently to the execution of such mortgage, obtained a judgment against the said King, and had taken out execution thereon, and had caused the same to be levied upon the mortgaged property; that said King was insolvent; and that by the express terms of said mortgage he was entitled to the possession of the mortgaged property on default being made.

The same facts were alleged in the answer, with the additional fact, that after the plaintiff had obtained the possession of the said property, he had sold the same and had received therefor the sum of \$—, which, after reimbursing him, left in his hands the sum of \$—, which the defendant Pierce asked should be applied on his judgment. The finding of the court does not show that the plaintiff owned the property in controversy and was entitled to the possession of the same, nor does it show the value of the property. It simply found that the plaintiff should pay into court the sum of one hundred and eighty dollars, for the benefit of Henry Pierce, and on such finding rendered judgment against the plaintiff for that sum and costs of suit.

There was no objection made to the form and character of the judgment when announced, nor was any motion made, after the judgment had been entered on the order-book, to correct or set it aside, and consequently no objection can be urged to the judgment in this court. See *Smith v. Dodds*, 35 Ind. 452 and *Train v. Gridley*, ante, p. 241.

Twelfth. After the rendition of the judgment, the plaintiff moved to set aside the submission, and in support of such

motion filed an affidavit, and a counter affidavit was filed on behalf of appellees. The clerk has copied such affidavits into the transcript, but this does not make them a part of the record. *Black v. Daggy*, 13 Ind. 383. It is provided in section 549 of the code, as follows:

"But a transcript of motions, affidavits, and other papers, when they relate to collateral matters, and depositions, and papers filed as mere evidence, shall not be certified, unless made a part of the record by exception, or order of court, and directed to be certified by the appellant."

Thirteenth. Hiram Brownlee, after the rendition of the judgment, made a written application to the court to be admitted as plaintiff. This could not have been done, unless a new trial had been granted. As long as the judgment stood, all matters connected with and involved in the action were *res adjudicata*. But if the application had been made before submission and trial, it would not avail anything, as the matter could only be presented by a bill of exceptions, which has not been done.

Fourteenth. After applying all the rules of construction and interpretation to the confused and mixed up entry of the clerk, we are at last enabled to understand that the reply to the fifth paragraph of the answer was stricken out, and the plaintiff excepted. The question has not been put upon the record by a bill of exceptions, the only way in which it could be done; no error can be assigned upon the ruling. See the decisions of this court collected in note 1, on page 208, 2 G. & H.

Fifteenth. We next come to consider the assignment of errors. There is but one valid assignment of error, and that is for overruling the motion for a new trial. The practice is quite common in this court for parties to assign for error here all the reasons for a new trial. This is wholly unnecessary. The assignment that the court erred in overruling a motion for a new trial, or in arrest of judgment, embraces and includes every valid reason set out in such motion. *The Bellefontaine Railway Company v. Reed*, 33 Ind. 476; *Shover v.*

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Jones, 32 Ind. 141; *Ewing v. Reno*, 32 Ind. 149; *Lingerman v. Nave*, 31 Ind. 222; *Ehrman v. Kramer*, 26 Ind. 409; *Stilwell v. Chappell*, 30 Ind. 72; *Crowfoot v. Zink*, 30 Ind. 446. The ruling of the court upon demurrers does not have to be assigned for a new trial, and consequently such ruling has to be assigned for error here. *The Cincinnati and Chicago Railroad Company v. Washburn*, 25 Ind. 259; *Gray v. Stiver*, 24 Ind. 174. The same rule obtains where no demurrer was filed to the complaint, and the appellant desires to raise in this court the questions of jurisdiction and the sufficiency of the facts stated, and there must be a specific assignment of error embracing the point. *Livesey v. Livesey*, 30 Ind. 398.

Sixteenth. The assignment of error by Hiram Brownlee cannot be considered by this court. He is not a party to the record; nor did he put his application to be made a party upon record by bill of exceptions; and that not having been done, he cannot be heard to complain of the ruling of the court below.

Seventeenth. Finally, we come to the consideration of the question of whether any question is presented by the record involving the correctness of the ruling of the court in overruling a motion for a new trial.

The first question is, was there a bill of exceptions? A bill of exceptions may be general, embracing everything that has to be made a part of the record by such bill, or it may embrace but one question. The complaint, answer, reply, demurrers, all proper entries made by the clerk, and the process, where there has been a judgment by default, constitute a part of the record without being incorporated in a bill of exceptions. 2 G. & H. 273, sec. 549.

The circuit court of Grant county commenced on the 27th day of September, 1869. The final judgment was rendered in this case on the 17th judicial day of said term. On that day the appellant prayed an appeal to the Supreme Court, and asked and obtained ninety days in which to prepare and file a bill of exceptions. There is a paper copied into the record, which we presume was intended for a bill of ex-

ceptions, but it does not possess any of the requisites of a bill of exceptions, except that it is signed by the judge. The date of the signing is in blank. The record does not show that it was ever filed. The draftsman, instead of copying the paper into the bill, has adopted the usual form of saying "(here insert)," and the clerk, in making up the transcript, instead of copying the paper, has used the same formula, and says "(here insert)," but it is impossible for us, situated as we are, to make the insertion. It is expressly declared in the paper that it does not contain all the evidence, and this statement is strengthened and confirmed by an examination of the paper. Where leave is given by the court to file a bill of exceptions after the term, the record must show when it was filed, and that it was filed within the time limited. *Atkinson v. Gwin*, 8 Ind. 376; *Lawton v. Swihart*, 10 Ind. 562; *Simonton v. The Huntington, etc., Plank Road Co.*, 12 Ind. 380; *Roloson v. Herr*, 14 Ind. 539; *Peck v. Van Kirk*, 15 Ind. 159; *Maffett v. Pollard*, 19 Ind. 178; *Timmons v. Vanderve*, 19 Ind. 291.

Inasmuch as the record shows by affirmative allegations, and it appears upon its face, that all the evidence is not before us, we cannot reverse the case for the refusal of the court to grant a new trial. The judgment is very imperfect and defective, but as no objection was urged to it in the court below, we cannot reverse for that reason.

The judgment is affirmed, with costs.

J. Brownlee and *H. Brownlee*, for appellant.

A. Steele and *R. T. St. John*, for appellees.

Campbell and Another v. Dutch.

CAMPBELL and Another v. DUTCH.

PRACTICE.—Motion for Judgment on Special Finding.—The overruling of a motion for judgment on a special finding can be presented in the Supreme Court as an error, where the motion states the ground of the application, and the party making the motion causes his exception to the ruling to be noted on the record, and assigns the error. No bill of exceptions is required in such a case, as the record presents the question.

SAME.—Special Finding Controlling General Verdict.—In a case where the special findings of a jury are used to control adversely their general verdict, it is required that all the facts to authorize an adverse conclusion should appear by such special findings.

APPEAL from the Clinton Common Pleas.

DOWNEY, J.—The history of this cause in this court has been somewhat eventful. The judgment was reversed on account of some mistake in supposing that the errors had been confessed, when they had not been; this judgment was set aside. The cause was then again submitted, and in due time there was a judgment of affirmance, with an opinion. Then there was a petition for a rehearing, which was granted, and the case again submitted. It now comes before us once more for consideration and determination, and we hope, as do the unfortunate litigants by this time, we have no doubt, that this may be the last time.

The action was by the appellee against the appellants. The complaint alleges that the plaintiff is the owner, and entitled to the possession, of certain personal property designated in the complaint, of which the defendants have possession, without right, and unlawfully detain from the plaintiff; wherefore he asks judgment for the recovery of the property, one thousand dollars damages, and other proper relief. The appellant Campbell was sheriff, and Solomon Kaufman, the other appellant, was the plaintiff in a judgment and execution by which, as they claim, the sheriff had seized the property in question.

The defendants answered, first, by general denial; and second, that Campbell was sheriff, had an execution in his

38	504
136	72
38	504
140	579
38	504
168	686

hands, issued by the clerk of the common pleas of Clinton county, on the transcript of a judgment from the docket of Alexander Hoover, Esq., a justice of the peace, which had been filed in the office of said clerk, in favor of Kaufman against Charles C. Dutch; that the property in question was the property of said Charles C. Dutch, and as such sold by the sheriff on said execution. A copy of the execution was filed with the answer and made part of it.

The reply is, first, the general denial of the second paragraph of the answer; second, that there was no such judgment and execution as specified in the second paragraph of the answer; third, that the case in which the supposed judgment was rendered by Esquire Hoover, in favor of Kaufman, was appealed to the circuit court of Boone county, and that Kaufman there dismissed his action. A copy of the record in that case is filed with the reply.

The issues were then tried by a jury, and there was a general verdict for the plaintiff, and findings on interrogatories submitted to the jury, as follows:

1. Who was the owner of the goods in question at the time of the levy made by Campbell? Ans. Charles C. Dutch.
2. Who was entitled to the possession of the goods at the time of the levy? Ans. Richard Dutch.
3. Had Kaufman or Campbell any right to the possession of the goods under the execution held by Campbell? Ans. They had not.

The defendants moved the court to render judgment in their favor on these findings, which motion was overruled by the court, and they excepted.

They then moved for a new trial, for the reasons that the verdict was not sustained by the evidence, was contrary to law and the evidence, and because the court had admitted improper and irrelevant testimony. The court overruled this motion also, and rendered judgment for the amount mentioned in the general verdict.

There are four errors assigned, the fourth of which has no

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foundation in the record, and the second and third present no questions to us, being only reasons for which the common pleas might, if well founded, have granted a new trial. There is no assignment as error, that the court improperly refused to grant a new trial.

The first and only error, then, is the refusal of the court to render judgment for the defendants on the special findings.

But we are met at this point by an objection to the consideration of this question, from counsel for the appellee, because there was no bill of exceptions putting in the record the making and overruling of this motion. There was a written motion specifying the ground of the application, which by statute becomes a part of the record, and an exception by the party caused to be entered by the clerk to the overruling of the motion. We see no use in a bill of exceptions in such a case. There is nothing to put in the record. The motion is based on what is already of record, the findings of the jury, as is the case when a pleading is demurred to, and we think the exception may be made without a bill of exceptions.

The code provides, that "where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted at the end of the decision that he excepts." 2 G. & H. 209, sec. 345; *Spencer v. Russell*, 9 Ind. 157; *Zehnor v. Beard*, 8 Ind. 96.

We think the exception was properly taken, and that no bill of exceptions was necessary.

In *The Bellefontaine Railway Co. v. Hunter*, 33 Ind. 335, this court said: "In case where the special findings of a jury are successfully used to control their general verdict, it is required that all the facts to authorize an adverse conclusion should appear by such special findings." See, also, *Morse v. Morse*, 25 Ind. 156; *Amidon v. Gaff*, 24 Ind. 128; *Delawter v. The Sand Creek Ditching Co.* 26 Ind. 407.

Are the special findings in this case so inconsistent with

the general finding as to override the same, and justify the rendition of the judgment sought by the defendants? We think they are not. The action was for the unlawful detention of the property from the plaintiff by the defendants. The special findings do not negative this allegation, which was found for the plaintiff in the general verdict. The jury found, by the second special finding, that the plaintiff was entitled to the possession of the property in question at the time of the levy, and must be understood to have found by the general verdict, as was alleged in the complaint, that he was entitled to the possession at the time he commenced his action.

We do not think that the fact found by the jury in answer to the first interrogatory can control the general verdict for the plaintiff. That finding is that Charles C. Dutch was the owner of the property at the time of the levy. This is not inconsistent with a right in Richard Dutch, the plaintiff, to the possession of it at the same time. If, then, he was entitled to the possession of the goods as found by the second special finding, and if the defendants unlawfully detained the same, as found by the general verdict, we think it must follow that the plaintiff was entitled to judgment on the general verdict.

But it is urged by counsel for the appellants, that the property was liable to be sold on the execution against Charles C. Dutch, which was in the hands of the sheriff, subject to the right of Richard Dutch to the possession thereof, and subject to whatever limited estate or interest he had in the same. Conceding that this is true, it does not follow that the defendants had a right unlawfully to detain the property from the plaintiff, who was, according to the finding of the jury, entitled to its possession.

It may be that the verdict of the jury was for a larger amount than the plaintiff was entitled to. But no objection to the verdict was urged on this ground in the common pleas. The property is alleged in the complaint to have been of the value of one thousand dollars. The verdict was

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for seven hundred and sixty-two dollars and fifty cents. The evidence not being in the record, and no objection to the verdict having been made on this ground, that matter is wholly beyond our cognizance.

Counsel for appellants pass over the third special finding by characterizing it as an absurdity. We are not so sure that it is entitled to so little consideration. If it was essential to the defence of the defendants, that they should show what they allege in the second paragraph of their answer, that is, that they sold the property by virtue of an execution issued on a judgment in favor of Kaufman against Charles C. Dutch, then the third finding would seem quite important, for it finds that they had no right to the possession of the goods under the execution. Whether this was on account of some defect in the execution, or because it was not founded on any judgment, or for some other reason, we do not know.

The existence of the judgment and execution is denied, as we have seen, in the second paragraph of the reply, and in the third it is alleged that the judgment had been vacated by an appeal and dismissal of the cause. But as we have already said, we do not regard the existence or non-existence of the judgment and execution as decisive of the case either way. If the defendants were acting under a judgment and execution, these would not empower them to unlawfully detain property to which another than the execution defendant was, at the time, entitled to the possession.

The judgment is affirmed, with costs.

J. E. McDonald, A. L. Roache, and E. M. McDonald, for appellants.

A. G. Porter, B. Harrison, and W. P. Fishback, for appellee.

Carmien v. Whitaker.

CARMEN v. WHITAKER.

JUSTICE OF THE PEACE.—*Appeal.—Separate Liability.*—Where a suit is brought before a justice of the peace against two persons on an account, and judgment is recovered against both, if one of the judgment defendants appeals, evidence showing his separate liability for the claim may be introduced on the trial of the appeal.

APPEAL from the Elkhart Circuit Court.

PETTIT. J.—This suit was commenced by the appellant against the appellee and one George H. Cox, before a justice of the peace, on this account:

"Andrew Whitaker and George H. Cox, to Curtis C. Carmien, Dr. to 160½ bushels of potatoes, at \$1.05 per bushel—\$168.52. June 1st, 1868."

Before the justice a judgment was rendered against both of the defendants, and Whitaker, alone, appealed to the circuit court. This is expressly provided for. 2 G. & H. 593, sec. 64. In the appellate court there was a trial by jury, verdict for the defendant, motion for a new trial overruled, exceptions, and judgment on the verdict.

There are, in form, eleven errors assigned, but in law there is but one, that of overruling the motion for a new trial; the others being only supposed causes for a new trial, and should all be argued in the briefs under the one assignment of error.

The only question in the case is, had the plaintiff, on the trial, the right to introduce evidence tending to prove the separate and sole liability of the defendant Whitaker, or should he be restricted to evidence showing the joint liability of both of the defendants before the justice?

This question arises, both on the evidence offered and rejected, and instructions asked and refused, and others that were given by the court. The consideration of the one branch necessarily disposes of the other. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." 2 G. & H. 218, sec. 368. "If all the defendants have been served, judgment

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may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them, or any of them, alone." 2 G. & H. 66, sec. 41. "Though all the defendants have been summoned, judgment may be rendered against any of them, severally, where the plaintiff would be entitled to judgments against such defendants, if the action had been against them severally." 2 G. & H. 217, sec. 366.

It should be kept in mind that an appeal from a justice of the peace to the circuit court, under our statute, must be tried as an original case, except that the informal pleadings before a justice may stand for the more formal pleadings in an original case in a higher court.

We hold that the plaintiff was fully warranted in introducing evidence to show the joint liability of Whitaker and Cox, or the separate liability of Whitaker. The sections of the code above referred to authorize the court to render judgment for or against one or more plaintiffs or defendants, but this cannot be done unless evidence can be introduced to show who is or is not liable to a judgment, or to recover in the action. We cite, without quoting from them, *Draper v. Vanhorn*, 12 Ind. 352; *Douglass v. Howland*, 11 Ind. 554; *Kuntz v. Bright*, 12 Ind. 313; *Hubbell v. Woolf*, 15 Ind. 204; *Cutchen v. Coleman*, 13 Ind. 568. There are numerous other cases in our own State and our sister states having similar codes to ours, which fully sustain this ruling. The court rejected evidence and gave and refused instructions contrary to this ruling, and the judgment must be reversed.

The judgment is reversed, at the costs of the appellee, and the cause is remanded for further proceedings not inconsistent with this opinion.

H. D. Wilson and *J. D. Osborn*, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellee.

The State, *ex rel.* LaPlante, *v.* Woodman and Others.

THE STATE, on the Relation of LAPLANTE, *v.* WOODMAN and Others.

JUSTICE OF THE PEACE.—*Attachment.—Garnishee.—Money paid on Condition.—Official Bond.—Pleading.*—Where a justice of the peace received money from a garnishee in an attachment proceeding against whom there was an order made to pay the money, and afterwards in a suit against the justice and the sureties on his official bond, on the relation of said garnishee, the complaint alleged that the money was paid to the justice, "to be held by him as such justice of the peace, until the final determination and adjudication of the rights of the respective parties connected with said cause, for the person entitled to said money and authorized to receive the same," and that the relator appealed from the judgment within thirty days, and the judgment was reversed, and the relator demanded the money from the justice, who refused to pay;

Held, that the complaint did not show a cause of action against the justice and his sureties.

Held, also, that if a justice receive money to be held otherwise than as the law directs, his sureties are not liable.

APPEAL from the Knox Circuit Court.

DOWNEY, J.—Suit on the bond of a justice of the peace, by appellant against appellees.

Woodman was elected justice of the peace, gave bond with the other defendants as his sureties, was sworn, and entered upon the discharge of his duties. While he was acting as such justice of the peace, one Kamplain sued La Cost, and the relator was made a garnishee in the action. On the 1st day of December, 1869, he was adjudged by the justice of the peace to pay, and on the 6th day of the same month did pay to the justice the sum of ninety-five dollars and sixty-five cents, as is alleged, "to be held by him as such justice of the peace, until the final determination and adjudication of the rights of the respective parties connected with said cause for the person entitled to said money and authorized to receive the same." Within thirty days from the rendition of said judgment, the relator appealed therefrom to the circuit court, where the judgment was reversed. On the 11th day of August, 1870, the relator demanded of Woodman said sum of money, which he refused to pay.

The State, *ex rel.* LaPlante, v. Woodman and Others.

A demurrer to the complaint stating these facts, for the reason that it did not state facts sufficient, was sustained by the court, and the plaintiff excepted.

The only error assigned is the action of the court in sustaining this demurrer.

We infer from what is said in the complaint, that the action referred to was a proceeding by attachment; that the relator was summoned to answer therein as a garnishee; that he did answer; that judgment was rendered against him; that, in pursuance of the judgment, he paid the amount thereof to the justice of the peace. That after this, and within thirty days, he appealed from the judgment to the circuit court, where the judgment was reversed.

It is not alleged that the money remained in the hands of the justice of the peace until the appeal was taken, but for anything that appears he may have paid it out in pursuance of law. It is alleged that the money was paid to the justice, "to be held by him as such justice of the peace, until the final determination and adjudication of the rights of the respective parties connected with said cause, for the person entitled to said money and authorized to receive the same."

This is not an allegation of a promise on the part of the justice of the peace. It is, at most, only an allegation of the intention of the party paying the money. As the money paid in by a garnishee is designed to be paid by the justice of the peace on the debt of the attaching creditor or creditors, we think that in order to show a cause of action against the justice and his sureties, it should have been alleged that the justice had not thus paid over the money, and that it remained in his hands at the date of the appeal from his judgment, after which time we suppose he could not legally pay over the money on the judgment. But suppose the money was paid to the justice of the peace on a condition different from that which the law would impose upon him, would his sureties be bound for its performance? They become sureties for the performance by him of the duties which the law

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imposes on him, and not for the discharge of obligations entered into by him not imposed by law.

Judgment affirmed, with costs.

W. F. Pidgeon, for appellant.

Allen, Usher, and Gardiner, for appellees.

COPPACK v. THE STATE.

CRIMINAL LAW.—*Indictment*.—*Perjury*.—Where an indictment for perjury did not purport to set forth a copy of an affidavit in the making of which the perjury was charged to have been committed, or of any part thereof, or set out the tenor of such affidavit in whole or in part, but only set out the substance thereof;

Held, that the indictment was, for this reason, fatally defective, and should have been quashed on motion.

APPEAL from the Hamilton Circuit Court.

WORDEN, C. J.—The appellant was indicted for perjury. Motion to quash overruled, and exception. The appellant was tried, convicted, and over a motion in arrest of judgment, sent to the penitentiary for the term of two years.

The indictment was based upon an affidavit charged to have been made by the defendant, in the name of John Reagan, before the deputy clerk of Hamilton county, for the purpose of procuring a marriage license.

The indictment does not purport to set forth a copy of the affidavit or of any part of it; nor does it set out the tenor of the affidavit, in whole or in part, but only the substance thereof.

We are of opinion that the indictment, for this reason, was fatally defective and should have been quashed.

In 2 Bishop Crim. Proced., sec. 845, the author sets out one of Archbold's forms for an indictment for perjury in an affidavit to hold to bail. He proceeds in the following section

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as follows: "Here, the reader perceives, the perjury consisted in a false affidavit, which was in writing. The substance, not the tenor, of the writing is given. The indictment complies, in this respect, with the statute of 23 Geo. 2. But, on principle, the gist of the offence of this particular perjury seems to consist of the false words of the writing; the same as would the offence of libel, if the words were libellous and the indictment were for the libel. Therefore, in the former case, they should be set out according to their tenor, the same as in the latter."

Our statute, as we think, fully adopts the principle above mentioned. It provides, that "in indictments for perjury in swearing to any written instrument, it shall only be necessary to set forth that part of the instrument alleged to have been falsely sworn to, and to negative the same, with the name of the officer or court before whom the instrument was sworn to." 2 G. & H. 452, sec. 44. This provision requires that part, and that part only, of the written instrument alleged to have been falsely sworn to, to be set forth. An instrument, or a part of it, cannot be "set forth" in any other way than to give the tenor thereof, or, in other words, an exact copy. In forgery it is held necessary to give the tenor of the instrument forged, in order that the court may see that it is one of those instruments, the false making or passing of which is punishable by law. *The State v. Atkins*, 5 Blackf. 458.

In cases of perjury committed in swearing to a written instrument, the necessity of setting out the tenor of the instrument, or of the part of it alleged to be false, is fully as great as in cases of forgery. It should be set out in order that the court may see that the language employed in the instrument bears the construction put upon it by the pleader in charging the perjury.

The judgment below is reversed, and the cause remanded, with instructions to the court below to quash the indictment. And it is further ordered that the appellant be returned to

the jailer of Hamilton county to abide the order of the court below.

T. J. Kane and *A. F. Shirts*, for appellant.

B. W. Hanna, Attorney General, and *J. F. Elliott*, for the State.

ROBACK and Another v. POWELL.

36	515
145	520

CONTRACT.—Tort.—Pleading.—Evidence.—Where suit is brought on a contract, an answer alleging damages sustained by the defendant from a tort committed by the plaintiff is subject to a demurrer; but if an issue of fact be made on the answer, proof should be admitted to support its averments.

APPEAL from the Marion Common Pleas.

PETTIT, J.—This suit was brought on an injunction bond. The complaint shows that Mary E. Roback, before her marriage with Alfred Roback, and while her name was Mary E. Coleman, brought suit and claimed to be the owner of a frame house, situated on her land; that Powell, defendant in that suit, plaintiff in this, and appellee in this appeal, was taking it down and removing it from her land, and praying an injunction, which was granted, she giving the bond on which this suit was instituted; that the injunction was subsequently dissolved and the suit dismissed for failing to prosecute the same when called for trial; that Powell was greatly injured by the issuing of said injunction; that the house was his, and that he had the right to remove it, etc.

The defendant Mary E. Roback answered, first, general denial; and second, "And for further answer, she says that the said William Powell entered upon her premises, described in said complaint, then in her possession, and tore down her house and carried the same away, to her damage, in the sum of two thousand dollars, for which sum she demands judgment."

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A reply of general denial was filed to the second paragraph of the answer. Trial by jury, verdict for plaintiff for one hundred and forty dollars, motion for a new trial overruled, and exception, and judgment on the verdict. The overruling of the motion for a new trial is the only error assigned, and that only, as stated in appellants' brief, "for the reason that the court refused to permit the defendants to introduce evidence to prove the second paragraph of the answer."

The suit was on a contract, and the answer was in tort. Can an injury or damage sustained by a trespass be set off against damages sustained or claimed for a breach of a contract in such a case as this? We answer no, and think we are fully sustained by the following authorities: *The Indianapolis and Cincinnati Railroad Co. v. Ballard*, 22 Ind. 448; *Shelly v. Vanarsdoll*, 23 Ind. 543.

If the second paragraph of the answer had been demurred to, the demurrer should have been sustained; but this was not done, and issue was taken on it by reply of general denial. This was a waiver of all objection to it, and entitled the defendants to introduce evidence to show the truth of its allegations. 2 G. & H. 92, sec. 64. The court erred in not allowing the defendants to prove the truth of the second paragraph of the answer.

The judgment is reversed, at the costs of the appellee.

J. W. Blake, E. W. Kimball, J. S. Harvey, and N. Van Horn, for appellants.

B. K. Elliott, for appellee.

MASON and Another v. SEITZ.

PLEADING.—*Contract.—Performance.*—In a suit to recover rent due on a lease of a house,

Held, that it was a sufficient allegation of performance by the plaintiff, to aver

the making of the contract, and that the defendant had been placed in possession of the premises and still retained possession thereof, and that a certain sum was then due for rent.

PRACTICE.—*Withdrawal of Pleading.—Open and Close.*—After the jury has been sworn, it is not a matter of right for the defendant to withdraw the general issue and assume the burden of proof, with the open and close of the evidence and argument. It is within the sound legal discretion of the court to permit or refuse this, and any action by the court in such matter will not be error in an ordinary case.

APPEAL from the Decatur Common Pleas.

BUSKIRK, J.—The appellee sued the appellants to recover for the rent of a hotel in Greensburgh. The action was based upon a written contract, which was filed with and constituted a part of the complaint. The complaint alleged that the contract referred to and made a part thereof was executed at the time therein named; that in pursuance thereof the defendants were placed in possession of the property, and that they still retained the possession; that by the terms thereof there was due from the defendants to the plaintiff, for the rent of such house and furniture, the sum of six hundred dollars, with the accrued interest, for which judgment was demanded.

A demurrer was overruled to this complaint, and an exception taken.

The defendants filed an answer consisting of six paragraphs: first, the general denial; second, payment; the third, fourth, and fifth alleged that the plaintiff had made false and fraudulent representations in regard to the house and furniture; that the defendants were ignorant in reference to the truth of such representations and relied upon the same as true, and failed to make a personal examination of the house and furniture. The paragraphs set out, in detail, the character and extent of the defects and deficiencies, and the amount of damages which they had sustained by reason thereof. The fifth and sixth paragraphs averred that the plaintiff had failed to keep and perform certain stipulations of the contract, and by reason thereof they had been damaged.

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A demurrer was overruled to the second, third, fourth, fifth, and sixth paragraphs of the answer. An exception was taken, but no cross errors have been assigned on such ruling, and consequently we are not required to determine as to the sufficiency of the answer.

The cause was tried by a jury, and resulted in a finding for the plaintiff in the sum of five hundred dollars.

The court overruled a motion for a new trial, and rendered judgment on the verdict.

The appellants have assigned several errors, but only two have been argued, and the others will be regarded as waived.

The overruling of the demurrer to the complaint is the first error assigned and relied upon. The objection to the complaint is, that it does not aver that the plaintiff had kept and performed the stipulations of the contract which were to be performed by him.

Section 84 of our code provides: "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part; if the allegation be denied, the facts showing the performance must be proved on the trial." 2 G. & H. 108. Under this section, a party is only required to allege the performance of a condition. This may be done by alleging generally that he had performed all the conditions on his part, or the pleader may state the facts showing the performance. The only purpose of this action was to recover the rent due upon the contract. The complaint alleged the execution of the contract, and that the defendants had been placed in and still retained the possession of the property leased, and that a certain sum was then due for rent.

We think that for the purposes of this action there was a sufficient allegation of performance. The placing of the defendants in the possession and enjoyment of the real and personal property described in the contract was a condition precedent to the right of the plaintiff to recover the rent,

and this is alleged in the complaint. *Richmond & Boston Turnpike Co. v. Rife*, 2 Ind. 316; *Purdue v. Noffsinger*, 15 Ind. 386; *Cromwell v. Wilkinson*, 18 Ind. 365.

If the defendants had, after the making of the contract, refused to perform on their part by taking the possession of the property leased, and an action had been brought to recover damages for such breach, then the plaintiff would be required to allege generally the performance of all the conditions on his part, or that he had tendered to the defendants the real and personal property described in the contract, and within the time therein named, and the refusal of the defendants to perform on their part, and the nature and extent of the damages by him sustained by reason of such refusal and failure to perform. We think there was no error in overruling the demurrer to the complaint.

It appears by a bill of exceptions in the record, that after the jury had been sworn, but before a statement of the case had been made, the defendants asked of the court, as a matter of right, to withdraw the general denial, and the right to open and close in the delivery of the evidence and argument of the cause to the jury, which was refused, and an exception was taken; and this action of the court is assigned for error. We think there was no error. If the application had been made before the jury was sworn, it could have been demanded as a matter of right, and it would have been error for the court to refuse; but when it was made after the jury had been sworn, it was within the sound legal discretion, of the court to grant or refuse the request. This court will review the exercise of a sound legal discretion, where there has been an abuse of it that injuriously affected the substantial rights of the party. If the court had permitted the defendants to withdraw the general denial, and had given them the burden of the issue and the right to open and close the argument, we would not reverse the judgment for that reason, nor do we think it should be reversed because it was refused. We are unable

to see how the granting or refusal to grant the request in a case like this could affect the substantial rights of the parties. *Sanders v. Johnson*, 6 Blackf. 50.

Section 99 of our code provides, that "the court may at any time, in its discretion, and upon such terms as may be deemed proper for the furtherance of justice, direct the name of any party to be added or struck out; a mistake in name, description, or legal effect, or in any other respect, to be corrected; any material allegation to be inserted, struck out, or modified to conform the pleadings to the facts proved; when the amendment does not substantially change the claim or defence." 2 G. & H. 118.

"Any pleading may be amended by either party of course at any time before the pleading is answered." *Id.* sec. 97. And again: "No cause shall be delayed by reason of an amendment, excepting only the time to make up issues, but upon good cause shown by affidavit of the party or his agent asking such delay." *Ibid.* Sec. 312, 2 G. & H. 193, provides: "Before the commencement of the trial an oath must be administered to each juror that he will well and truly try the matter in issue between the parties."

A construction has been placed upon these several provisions of our code by this court. *Ostrander v. Clark*, 8 Ind. 211; *Shank v. Fleming*, 9 Ind. 189; *Kerstetter v. Raymond*, 10 Ind. 199.

From the foregoing provisions of our code, and the above decisions, it is quite obvious that the issues must be closed before the case is submitted to a jury; that no amendment can be made, as a matter of right, after the trial has commenced, but is within the discretion of the court; and that the court is only required to permit an amendment for the furtherance of justice. There may be cases where the ends of justice may require that the defendant should be permitted to withdraw his denial for the purpose of giving him the right to assume the burthen of the issues, and to open and close the argument, but this is not one of them. We

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think the court did not err in overruling the application of the defendants.

The judgment is affirmed, with costs.*

J. Gavin and J. D. Miller, for appellants.

C. Ewing and J. K. Ewing, for appellee.

*Petition for a rehearing overruled.

36	521
168	653

MILLER and Another, Executors, v. DUY, Guardian.

GUARDIAN AND WARD.—*Maintenance and Education.*—*Executors.*—A guardian may sustain an action against the executors of an estate holding property to which his wards are heirs under the will, and in excess of any indebtedness of the estate, for a proper sum for the maintenance and education of his wards.

APPEAL from the Sullivan Common Pleas.

PETTIT, J.—This suit was brought by the appellee against the appellants, to compel them to pay over to him moneys for the maintenance and education of his wards.

The complaint shows that the plaintiff is the guardian of two minor children; that their grandfather left them an estate, real and personal, equal to ten thousand dollars, by his will; that the defendants are the executors of the will, and have the whole of the estate in their hands, and refuse to furnish anything for the support of the wards; that the estate is worth a large sum over and above the debts and liabilities of the testator, more than one-third of the assets over what is necessary to pay all the liabilities of the deceased; that the wards have no other means of support or education, and are under the necessity of receiving something from the estate thus willed to them.

It is left to the court to say how much shall be paid over, and what other relief shall be granted.

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The guardian offered to enter into any further and additional bond that the court might require.

The defendants demurred to this complaint, for want of sufficient facts, which was overruled, and this ruling was excepted to; and this is the only legal or proper assignment of error. This ruling is so correct and palpably right, that it is only necessary to refer to 2 G. & H. 520, sec. 120.

The judgment is affirmed, at the costs of the appellants.

S. Coulson, for appellants.

J. M. Hanna, for appellee.

THE CITY OF TERRE HAUTE v. TURNER.

CITY.—Grading of Streets.—Consequential Damages.—Where a street, alley, or sidewalk is graded in a careful manner pursuant to an ordinance, or resolution, or motion duly passed by the proper vote of the city council, the owners of lots contiguous thereto have no right to compensation for consequential damages to such lots, unless such damages are expressly given by statute; and when thus given, compensation must be sought in the manner prescribed by statute.

SAME.—Obstruction of Street.—A city has the power to prevent improper obstruction of streets and sidewalks.

APPEAL from the Vigo Common Pleas.

DOWNEY, J.—Turner sued the city of Terre Haute, alleging in his complaint, that he was the owner of certain real estate fronting on the national road, in that city, on which real estate he had erected a costly warehouse, the front of which was on the line of the north side of said road; that the interior of his warehouse was arranged for use with the level of said road as graded by the government of the United States, and that it had been so used by him since the time of its erection, making large gains and profits thereby, on account of its convenience and easy access, without which he could not have made anything. That in 1867, the city, with-

out lawful authority, pretended to extend her gradation over said ground and said national road, south of the same, and then entered upon said road against his consent, and changed the level of the grade of the road, and cut down and removed the earth on the south of his land and warehouse, and up to the south line thereof, to the depth of six feet, and thereby rendered access to said warehouse, on the south, inconvenient and impossible, and rendered the same useless for the purpose of a grain warehouse, for which it was erected, without an entire change of the internal arrangement at great costs. And after so changing said grade, the defendant refused to allow the plaintiff to use said road, which had been used for twenty years as a public highway, for the purposes of loading and unloading from his said warehouse, thereby rendering the same entirely useless, and causing him great damage and inconvenience, and greatly injuring the plaintiff's business, to wit, in the sum of five thousand dollars. Wherefore, etc.

To this complaint the city answered, first, by a general denial, and second; that she was a city regularly organized and incorporated under the general law of the State of Indiana; that the property described in the complaint is located near the centre of the corporate limits, is on a public street, called Main street, which is the same described in the complaint as the national road; that the common council of the said city, during the last summer, considered that it was necessary and that public convenience required that said street, in front of said warehouse and for forty rods east and west thereof along said street, should be graded so as to render the grade of the street and the sidewalks along the same uniform, and by a two-thirds vote ordered that said street be so graded and gravelled; that said order, with the yeas and nays, was duly entered upon their records as a part of their proceedings, at a regular meeting thereof; that pursuant to said order, she caused said work to be done, which is the grievance complained of; that in making said grade, the earth in front of said building was removed to the depth complained of by

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the plaintiff; that the same was a necessary and proper grade, was skilfully and carefully made, doing no unnecessary damage, and without malice; that the surface of said lot is still five feet below the present grade of the street, and the walls of the plaintiff's house are seven feet below said sidewalk; that said building is in a populous part of the city, on Main street, and that public convenience required that plaintiff should not be permitted to load and unload wagons of grain upon said sidewalk; that the other three sides of said building are unobstructed and easy of access for wagons. Wherefore, etc.

A demurrer filed by the plaintiff to the second paragraph of the answer was sustained, and the defendant excepted.

A trial by jury resulted in a verdict for the plaintiff of three thousand five hundred and sixty-two dollars and fifty cents.

A motion for a new trial was made and overruled, and proper exception taken. The evidence is all in a bill of exceptions in the record.

Two errors are assigned; first, the sustaining of the demurrer to the second paragraph of the answer; and second, the refusal to grant a new trial.

In support of the ruling of the court on the demurrer to the second paragraph of the answer, it is insisted by counsel for the appellee, that the action of the city council was illegal and void, because the improvement was not authorized and ordered by an ordinance; while the appellant's counsel contend that it was legal and proper for the council to authorize and require the work to be done by an order or resolution of the council without any ordinance.

The first case to which our attention has been called on this point is that of *The City of Indianapolis v. Imberry*, 7 Ind. 1 175, decided under the statute as it stood in 1859. This language was used in deciding the case: "By the charter the council has jurisdiction over the streets and alleys of the city, with power to provide for their improvement and repair. It has power to order them graded, and gravelled, and paved. It

may do this, first, upon the petition of freeholders, according to sec. 66 of the charter, by a majority vote; second, by a two-thirds vote of the council, without a petition, according to sec. 68 of the charter. It does not appear, nor is it necessary that it should, in this case, whether there was a petition or not. The manner in which the order or determination of the council that a given street or alley or part thereof shall be improved is to be expressed is not pointed out in the paramount law, but we think it need not be by ordinance. We think it may be expressed by motion or resolution."

In *The Board of Commissioners of Allen Co. v. Silvers*, 22 Ind. 491, which related to the construction of a sewer, and was, under the law then in force, governed by the same rules which governed in improving streets, alleys, etc., it was held that an ordinance was unnecessary, and *The City of Indianapolis v. Imberry*, *supra*, was cited as authority.

It may be conceded that changes have been made in the statute relating to the incorporation of cities since these cases were decided, the present law containing some provisions which were not in any of its predecessors; but we have not been referred to any provision, nor been able to find any, which seems to us to require a different rule of construction. The language of sec. 68 in the present statute, "the common council may cause the same to be done, by contracts given to the best bidder, after advertising to receive proposals therefor," does not seem to contemplate an ordinance. Still less does the language of sec. 70, under which this improvement was ordered by a two-thirds vote, seem to contemplate any such thing.

Counsel for appellee refer to sec. 56, which is as follows: "The common council shall have power to make other by-laws and ordinances not inconsistent with the laws of this State and necessary to carry out the objects of the corporation, and to enforce the observance of all by-laws and ordinances, by enacting such penalties for their violation, not exceeding one hundred dollars for any offence, which may be recovered in an action at law, with costs, as they may deem

right and proper." It is very clear to us that this section falls very far short of requiring that improvements of streets, alleys, sidewalks, etc., shall be authorized only by ordinance. It may authorize the council to enact or adopt ordinances, for that purpose, but it certainly does not require them to do so, or prevent them from ordering such improvement by a simple vote or resolution of the council.

The case of *The City of Indianapolis v. Miller*, 27 Ind. 394, is cited by counsel for appellee as deciding that such improvements can only be made by authority of an ordinance. That case was this: Miller got authority from the city, by a simple resolution, to obstruct the street with building materials, which act was a violation of a previously adopted ordinance of the council. Having been notified to remove the obstruction, and having failed to do so, the city removed it. For this Miller sued the city. The city set up the ordinance in defence, and Miller replied the subsequent order or resolution of the council, claiming that it was an ordinance. This court decided that it was not an ordinance, and did not protect Miller from the charge of violating the ordinance by obstructing the street; that the obstruction was, consequently, a nuisance, and that the city had a right to abate it. This was all that was involved in the case, and all that was decided.

It is true that it was said by the learned judge who delivered the opinion, that the power to obstruct a street was of a legislative character, and could only be exercised by an ordinance, passed under the formalities required by law. *Wood v. Mears*, 12 Ind. 515, was referred to as if it decided the same thing; but an examination of that case will show that while it decides that a street may be obstructed by the authority of an ordinance, it does not decide that it can be authorized by an ordinance only. But the case in 27 Ind. is not a case in point. It has no relation to the improvement of streets, etc., and is no authority on the point in question.

When a street or sidewalk is graded in a careful manner,

pursuant to legal authority, the owners of lots contiguous thereto have no right to compensation for consequential damages to such lot, etc., unless such damages are expressly given by statute; and when thus given, compensation must be sought in the manner prescribed by the statute. *The City of Vincennes v. Richards*, 23 Ind. 381, and authorities there cited. Little is said in argument about the refusal of the city authorities to allow the appellee to occupy and obstruct the sidewalk while loading and unloading wagons in front of the warehouse. The paragraph of the answer in question shows that the sidewalk in question, at the point in question, is a populous part of the city, on Main street, and that public convenience requires that the plaintiff should not be permitted to load and unload wagons on the sidewalk. The city has the power to prevent improper obstruction of the streets and sidewalks. 3 Ind. Stat. 85, subsection 18, "to prevent the encumbering of streets, squares, sidewalks and crossings with vehicles, or any other substance or materials whatever interfering with the free use of the same."

We must, therefore, hold that the second paragraph of the answer was a good bar to the action, and that the common pleas committed an error in sustaining the demurrer thereto.

The other questions discussed relate to the measure of damages, the admissibility of certain evidence relating thereto, etc., and need not, we suppose, be considered by us.

The judgment is reversed, with costs, and the cause remanded.

W. Mack, S. C. Davis, S. B. Davis, and W. D. Bynum, for appellant.

R. W. Thompson, H. D. Scott, and G. C. Dwyer, for appellee.

Ex Parte Wiley.

EX PARTE WILEY.

HABEAS CORPUS.—Jurisdiction.—A writ of *habeas corpus* must issue from a court of the county where the person applying for the writ is restrained of his liberty, except when the judge of said court is unable or incompetent to hear and determine the application.

APPEAL from the Decatur Circuit Court.

PETTIT, J.—Wiley was a prisoner in the southern state prison, at Jeffersonville, in Clark county, under a sentence for life by the Decatur Circuit Court on a trial and conviction of murder. He made application to the Decatur Circuit Court, in session, for a writ of *habeas corpus* to relieve him from imprisonment, on the ground that the judge who presided at his trial had no power or jurisdiction to hold the court or try him.

The Decatur Circuit Court refused the writ and dismissed the petition. Exception was taken, and appeal to this court.

The appellant's attorneys have presented us with an able and learned printed brief on the question of the jurisdiction of the judge who tried and passed sentence on the petitioner; but a supplemental brief admits that the Decatur Circuit Court had no jurisdiction in the *habeas corpus* case. See 3 Ind. Stat. 285, sec. 716. The attorneys for the appellant, nevertheless, ask us to pass upon the questions presented in their brief, as to the jurisdiction of the judge who tried and sentenced the prisoner, but we decline to do so, because we have more questions legally and legitimately before us than we can examine and decide, and we have no time to write dissertations or amateur lectures on questions of law not properly before us.

The court committed no error in refusing the writ and dismissing the petition.

The judgment is affirmed, at the costs of the appellant.

J. Gavin, J. D. Miller, W. O. Foley, C. Ewing, and J. K. Ewing, for appellant.

MITCHELL v. BURCH.

36 529
136 240

REPLEVIN.—*Practice.*—*Verdict.*—*Damages.*—On the trial of an action of replevin to recover eighteen hogs, the jury returned the following verdict: "We, the jury, find the property replevied to be the property of the plaintiff, and assess his damages at twenty-five dollars, and assess his damages for the detention thereof at twenty-five dollars. GEORGE RIDGE, Foreman."

"We, the jury, find the nine hogs not replevied to be the property of the plaintiff and are of the value of ninety-five dollars, and assess his damages for the detention thereof at ninety-five dollars. GEORGE RIDGE, Foreman."

Held, that the verdict was sufficient; that it would have been better to have embraced the entire finding in one verdict, but the informality would not vitiate, and a motion for a *venire de novo* was properly overruled.

Held, also, that the plaintiff was entitled to damages for the time necessarily spent and expenses incurred in hunting for his hogs. He was also entitled to compensation for any deterioration in the value of his property while in the hands of the defendant.

APPEAL from the Fountain Common Pleas.

BUSKIRK, J.—This was an action of replevin brought by the appellee against the appellant, to recover the possession of eighteen head of hogs, which he alleged belonged to him, and had been illegally and unlawfully taken, and were unlawfully and wrongfully detained by the appellant.

The appellant answered in two paragraphs: first, denial; second, that the defendant was the owner of the hogs in controversy. The cause was tried by a jury, which returned the following verdict:

"We, the jury, find the property replevied to be the property of the plaintiff, and assess his damages at twenty-five dollars, and assess his damages for the detention thereof at twenty-five dollars.

GEORGE RIDGE, Foreman."

"We, the jury, find the nine hogs not replevied to be the property of the plaintiff, and are of the value of ninety-five dollars, and assess his damages for the detention thereof at ninety-five dollars.

GEORGE RIDGE, Foreman."

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The appellant moved the court to set aside the said verdict for informality and uncertainty, and order a *venire de novo*. This motion was overruled, and the appellant excepted.

The appellant moved the court for a new trial, and assigned therefor the following reasons:

First. The verdict of the jury is not sustained by sufficient evidence.

Second. The verdict of the jury is contrary to law.

Third. The damages assessed are excessive.

Fourth. Error in assessment of the amount of recovery, the same being too large.

Fifth. Error in the action of the court in rendering judgment upon the verdict and refusing a *venire de novo*.

The motion was overruled, and the appellant excepted.

The court rendered a judgment on the verdict. The judgment was that the plaintiff was the owner of, and entitled to the possession of the hogs described in the complaint, and that the plaintiff recover of and from the defendant, the sum of one hundred and twenty dollars as and for his damages as assessed by the jury, and costs of suit.

The evidence is in the record by bill of exceptions. The appellant has assigned the following errors:

First. The court erred in overruling the appellant's motion to set aside the verdict of the jury, and for a *venire de novo*.

Second. The court erred in rendering judgment upon the verdict of the jury, and in overruling the appellant's motion to set the verdict aside.

Third. The court erred in overruling appellant's motion for a new trial.

We think the court committed no error in overruling the motion for a *venire de novo*. The plaintiff, in his complaint, claimed that the defendant had unlawfully taken, and was wrongfully in possession of eighteen hogs that belonged to him. The writ was for eighteen hogs. The sheriff, by virtue of the writ, took from the defendant nine hogs and delivered them to the plaintiff. The other hogs were not found.

The jury found separately as to the hogs replevied and those not replevied. It would have been better to have embraced the entire finding in one verdict, but the form adopted does not vitiate the verdict. It is in reality but one verdict. The jury found as to the hogs replevied, that the plaintiff was the owner and entitled to the immediate possession, and assessed the plaintiff's damages for the detention of them at twenty-five dollars. There is a repetition of the finding of the damages, but it was evidently the intention of the jury to find only twenty-five dollars as the damages. Whatever uncertainty there was in the verdict as to the damages was remedied and rendered certain by the court only rendering judgment for twenty-five dollars. If a verdict can be understood, it will be sustained although informal, but if it is so uncertain that it cannot be understood it will be set aside. *Jones v. Julian*, 12 Ind. 274; *Collins v. Makepeace*, 13 Ind. 448. As the plaintiff obtained by the writ the possession of the hogs replevied, there was to be no order for the return of said property, and therefore it was not necessary to find the value of the hogs replevied. 2 G. & H. 219, sec. 364, provides, that "in an action to recover the possession of personal property, judgment for the plaintiff may be for the delivery of the property, or the value thereof in case a delivery cannot be had, and damages for the detention. Where the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or its value in case a return cannot be had, and the damages for the taking and withholding of the property." *Tardy v. Howard*, 12 Ind. 404, and *Chissom v. Lamcool*, 9 Ind. 530, give a construction to the above section.

It is next assigned for error that the court erred in rendering a judgment for the plaintiff upon the verdict. We are unable to see any error in that, as it was the duty of the court to render such judgment unless a *venire de novo* was awarded or a new trial granted.

The next error assigned is based upon the action of the

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court in overruling the motion for a new trial. In the first place it is maintained that the verdict is not sustained by the evidence. We will consider this question first as to the hogs replevied, and secondly, as to those not replevied.

We have examined the evidence with care, and are of the opinion that the decided preponderance of the evidence was clearly with the plaintiff in reference to the hogs replevied. The evidence offered by the defendant would not have more than raised a reasonable doubt of his guilt, if he had been upon his trial for the larceny of such hogs.

The evidence in reference to the hogs not replevied was not so plain and certain, for want of the personal examination and identification of the hogs, as that in reference to the hogs found in the possession of the appellant. The evidence, in our judgment, establishes the following facts. The plaintiff had, in a lot of about three-quarters of an acre, about thirty hogs. The fence was safe and secure. There was a gate that was securely fastened with a pin. Eighteen of the hogs were pigged the plaintiff's, on his farm, in October, 1868. The thirty head of hogs had been kept in said lot during the winter, and down to the early part of May, 1869. They had been let out occasionally and taken to water, and then returned to the lot. They were being fattened for the June market. The hogs were in the said lot after dark on an evening early in May, 1869. The gate was fastened so securely that the plaintiff preferred to climb over the fence rather than to take the pin out and open the gate.

The hogs went from the lot into a meadow. It was not known whether the meadow fence was up or down. When the hogs got into the road there was a lane leading up to defendant's house. The next morning the gate was open and the pin was lying near the gate post, and eighteen of the largest and fattest of the hogs were gone. A very careful and diligent search was made the next day over the farm of the plaintiff, and for about three weeks through the neighborhood, when eleven of the plaintiff's hogs were seen and identified by several persons on the farm of the defendant;

but when the sheriff went there with the writ, only nine of the plaintiff's hogs were found.

The theory of the defence was, that the hogs in controversy had been pigged the defendant's, and that they had been put up by the plaintiff, and had got out, and had gone home. This theory was overcome by the evidence, which showed that the nine hogs found at the defendant's had been continuously at the plaintiff's from in the fall until the first of the May following, and they had been kept and fed with other hogs. If the hogs had been pigged on the farm of the defendant, they would have lost all knowledge of their old home. The defendant lived about one mile from the plaintiff. We think that the evidence shows that the gate was opened, and the hogs were driven away. If they had gotten out themselves they would most likely, following their instincts and habits, have wandered over the farm, or neighborhood, and when they became hungry would have returned to the place where their comrades were, and where they had been fed so many months. As a part of the missing hogs were found on the farm and under the control of the defendant, and the others were never seen or heard of in the neighborhood, we are inclined to hold that the jury were justified in finding that the defendant had obtained wrongfully the eighteen hogs; and when to this evidence is added the additional facts, that the defendant admitted that the nine hogs found at his farm were hogs that the plaintiff had been feeding, and that a witness who had assisted the plaintiff in marking his pigs testified that the defendant had offered him five dollars to swear that the plaintiff had marked his hogs differently than he had, and that this was not denied by the defendant when he was examined as a witness, we are satisfied that there was evidence from which the jury might have found as they did. We do not feel authorized or required by the principles of law, and the rules of practice in this court, to disturb the finding of the jury on the weight of the evidence.

It is next insisted that the damages were excessive, for the

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detention of the nine hogs that were replevied. As we have seen, the jury assessed the plaintiff's damage at twenty-five dollars for the detention of the nine hogs.

The solution of this question will depend upon the elements that enter into and constitute the basis for determining the measure of damages for the detention of personal property, in an action of replevin.

The plaintiff testified as follows:

"I lost two weeks time hunting hogs; hands were worth one dollar per day; team to plow worth from one dollar and fifty cents to two dollars per day; had to stop the plow while hunting the hogs, as I only had two work horses, and used one to ride."

An elementary writer states the law thus: "When the property has been delivered to the plaintiff, and the jury find for him, they should assess the damages for the detention, and he is entitled to compensation for any deterioration in the value of the goods replevied, while they were in the hands of the defendant, and also for his time lost and expense incurred in searching for his property, and to the hire of slaves. When the property has not been delivered to him, the jury should also find the value of the property. In this case the damages for detention are usually interest on the value from the time of taking, but in proper cases exemplary damages may be given." *Morris Replevin*, 193-4.

NELSON, C. J., in delivering the opinion of the court in *Bennett v. Lockwood*, 20 Wend. 224, says: "The defendant took the horse and wagon of the plaintiffs wrongfully, and used them, by reason of which taking the plaintiffs were induced to believe that the person to whom they had hired them temporarily had absconded, and therefore they went in pursuit of their property, and expended time and money. It is insisted for the plaintiffs in error that the common pleas erred in allowing the plaintiffs to recover for the time spent, and expenses incurred, on the ground that the damages thus claimed were not the natural or necessary consequence of the wrongful taking. Admitting the counsel for the plain-

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tiffs to be right in this proposition, it is no objection to the recovery if the damages were proximate and not too remote, and were claimed in the declaration. 1 Chitty's R. 333; Saund. Pl. and Ev. 136. Here the damages were duly claimed; they occurred in the use of reasonable means on the part of the plaintiffs to repossess themselves of their property, and were occasioned by the wrongful act of the defendant."

It was held in *Gordon v. Fenney*, 16 Mass. 470, that "any deterioration of the goods, while in the possession of the defendant after the unlawful taking, is a proper subject of damages. But after they are restored, if they should be injured, decayed or otherwise impaired in value, it must be at the plaintiff's risk, if he prevails in the suit, however long the process may continue; because he may always convert them into money, under such circumstances as will furnish proper evidence of their value, when he comes to be answerable upon his bond, or he may keep them in possession at his election."

We are of the opinion that the plaintiff was entitled to recover damages for the time necessarily spent and expenses incurred in hunting for his hogs. He does not claim for any time spent or expense incurred after he had ascertained where his hogs were. He would have no right to recover for time spent or expenses incurred after he had ascertained where his property was. It is shown by the evidence by the defendant that he knew that the plaintiff was hunting for his hogs, and did not inform him where they were. We are of the opinion that the hogs of the plaintiff were wrongfully taken away by the defendant, and that he permitted the plaintiff to spend time and money, and delay his plowing, in the search for his property, and that it is reasonable and just that he should compensate him in damages therefor. We do not think the amount found by the jury is excessive, upon the facts in the case. The court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

T. F. Davidson, for appellant.

J. H. Brown and *J. McCabe*, for appellee.

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158	182
158	182

SCHEARER v. HARBER.

EVIDENCE.—Interpreter.—Evidence of what an interpreter testified as received by him in a foreign language from a witness, on a former trial, cannot be given by one who heard the evidence, unless the interpreter be dead, or insane, out of the jurisdiction, or sick and unable to testify, or having been summoned, appears to have been kept away by the adverse party.

APPEAL from the Allen Common Pleas.

WORDEN, C. J.—The original opinion in this case having been lost from the files, we have, in passing upon the petition for rehearing, reconsidered the whole case, and will state it as fully as if no opinion had been previously prepared.

The action was originally brought before a justice of the peace, by the appellant against the appellee, where it was tried, and an appeal was taken to the court of common pleas, where, upon trial, a verdict and judgment was rendered for the defendant.

The case made for our decision is shown by the following bill of exceptions taken by the appellant, which we set out nearly in full. After entitling the cause, the bill of exceptions proceeds as follows:

“Be it remembered that the foregoing cause came on for trial at the February term, in the year 1869, of said court, upon appeal from A. P. Creighton, a justice of the peace in and for said county; that the only pleading filed in said cause was the complaint, which was in the words and figures following, to wit:

‘December, 1864.

Mr. Nicklaus Harber debtor to me, one hundred and ten dollars for two oxen.

\$110.00.

PHILLIP SCHEARER.’

That on the 5th day of March, 1869, the same being the eleventh judicial day of said term, a jury was duly impanelled and sworn to try said cause; that during the trial of said cause before the jury aforesaid, the said plaintiff, Phillip Schearer, was put on the witness stand and testified as a wit-

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ness in his own behalf; that while so on the witness stand he testified in his examination in chief, that he had sold the yoke of oxen in the complaint mentioned to the defendant, for the sum of one hundred and ten dollars; that upon his cross examination, he further testified that he had given evidence as a witness upon the former trial of said cause before Justice Creighton and a jury; that thereupon the defendant in further cross examination propounded to the plaintiff, then still on the witness stand, the following question, to wit: 'Did you not, upon the former trial of this case, before Justice Creighton and a jury, swear that the defendant, Harber, had never agreed to give you more than one hundred and five dollars for the oxen?' To which the plaintiff answered, 'no;' and thereupon the defendant propounded to the plaintiff, in further cross examination, the following question, to wit: 'Did you not, upon the same trial, swear that Harber never agreed to give you more than one hundred and five dollars for the oxen, but that you thought you ought to have one hundred and ten?' To which the plaintiff answered, 'no.'

"And be it further remembered that afterward in the further progress of said trial, the defendant put upon the witness stand as a witness Jacob Smith, who, being duly sworn, testified as a witness, as follows, to wit: 'I was present at the trial of this cause, before the magistrate, as a juror in the case.

"Inter. 'State whether the plaintiff, Schearer, swore on that trial, that Harber never agreed to give more than one hundred and five dollars for the cattle.' Answer. 'He testified that Harber never agreed to give more than one hundred and five dollars for the cattle.'

"Inter. 'State whether Mr. Schearer, upon the trial of that cause, also swore that Harber never agreed to give more than one hundred and five dollars, but that he thought he ought to have one hundred and ten.' Answer. 'Yes, he said he ought to have one hundred and ten dollars for the oxen, but that Harber never agreed to give over one hundred and five.'

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"Cross examination. 'Mr. Schearer testified on the stand in the German language, and it was given to the jury by an interpreter. I do not understand or speak German; my only knowledge I have of what he said is what the interpreter told us.'

"And thereupon, the plaintiff, by counsel, objected to the introduction of said testimony, of the said witness, given by him in his examination in chief, and moved to strike out the same on the ground that it was incompetent and immaterial as being mere hearsay; and on the further ground that said interpreter had not been produced or offered or proposed to be called as a witness, or his absence explained or accounted for, which was the fact. But the court held that the evidence objected to was competent as offered; that it was not necessary before or after offering the same to offer, or account for the absence of the said interpreter, and thereupon overruled the plaintiff's objection to the said evidence, and his motion to strike out the same, to all of which the plaintiff excepted at the time. And the plaintiff thereupon notified the court that he intended to take said question of law to the Supreme Court, upon bill of exceptions only.

"And be it further remembered, that in the course of the trial of said cause before the jury, the defendant claimed as a fact, and offered evidence tending to prove, that he had bought said oxen in the complaint mentioned, for the sum of one hundred and five dollars, and that he had paid the plaintiff said sum of one hundred and five dollars on the same day before the commencement of this suit; that the plaintiff claimed as a fact, and offered evidence tending to prove, that he had sold said oxen to the defendant for one hundred and ten dollars, but he admitted as a fact, and in his testimony as a witness, that the defendant had paid him one hundred and five dollars upon the purchase of said oxen before the commencement of this suit; that the plaintiff also claimed as a fact that there had been a misunderstanding between himself and the defendant at the time of said sale, as to the price of said oxen; that he and the defendant had never really agree-

upon any price, and that therefore he was entitled to recover the value of said oxen at the time of said sale, less the amount of one hundred and five dollars, which had been paid on them before suit; that he offered evidence tending to prove that said oxen were, at the time of said sale, worth one hundred and seventeen dollars; that it was upon this latter claim that the plaintiff relied in the final submission of his cause to the jury; and that the court charged the jury, amongst other things, that if they found from the evidence that the parties never did agree as to the price of the oxen, and that the defendant, with the plaintiff's consent, took and kept the oxen as his own, they should find for the plaintiff what the evidence showed the oxen to have been worth at the time of the sale, less the amount which had been paid thereon."

The bill of exceptions further shows that the plaintiff moved for a new trial and filed written reasons therefor, amongst which is the overruling of the objection of the plaintiff to the evidence of Jacob Smith as given on the trial, and the overruling of his motion to strike the same out; that the court overruled the motion for a new trial, and that the plaintiff excepted.

Error is assigned upon the overruling of the motion for a new trial.

The first question that arises in the case is one of jurisdiction. The counsel for the appellee insist that no appeal lies to this court in the case, inasmuch as no such appeal lies in actions originating before justices of the peace where the amount in controversy, exclusive of interest and cost, does not exceed the sum of ten dollars. 2 G. & H. 269, sec. 550. If we are to look to the pleadings alone to determine the amount in controversy, the whole sum claimed by the appellant, viz.: the sum of one hundred and ten dollars, is in controversy, as there was a judgment for the defendant. The plaintiff claimed that amount and recovered none of it, and it would seem to follow that that amount is in controversy. On the other hand, if we may look to what transpired on the

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trial, including the evidence, to determine the amount in controversy, we learn by the bill of exceptions that the plaintiff claimed as a fact that there had been a misunderstanding between himself and the defendant, at the time of the sale, as to the price of the oxen, and that he and the defendant had never really agreed upon any price, and therefore that he was entitled to recover the value of the oxen at the time of the sale, less the one hundred and five dollars that had been paid thereon; and he offered evidence tending to show that the oxen were worth one hundred and seventeen dollars, and the court charged the jury that if they found that the parties had not agreed as to the price of the oxen, and that the defendant, with the plaintiff's consent, took and kept them as his own, they should find for the plaintiff what the evidence showed the oxen to have been worth at the time of the sale, less the amount that had been paid thereon, which was admitted to have been the sum of one hundred and five dollars, and not claimed to have been any more. Hence, in any view which we can take of the case, there seems to be more in controversy than the sum of ten dollars, exclusive of interest and cost.

The appeal is well taken.

We come to the main question in the cause. Was the testimony of Jacob Smith competent? We have seen by the bill of exceptions that the plaintiff, in testifying before the justice, employed the German language, and that Smith neither spoke nor understood that language. All he professed to know of the plaintiff's testimony on the trial before the justice, was from the interpretation of that testimony, rendered to the jury on that trial. In what relation does an interpreter, appointed by the court to interpret the testimony of a party or other witness in a cause, stand to the party whose testimony is to be interpreted? Is the interpreter to be deemed the agent of the party interpreted? The statute provides simply, that "interpreters may be sworn to interpret truly whenever necessary." 2 G. & H. 167, sec. 237.

It is quite clear that an interpreter so appointed is not

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thereby made the agent of the party whose testimony is to be interpreted. The court may swear any fit person as an interpreter without the consent of the party whose testimony is to be interpreted, or against his wishes. It does not appear that the interpreter appointed to interpret the appellant's testimony before the justice of the peace, was appointed at his instance, or even with his consent. The case, therefore, does not come within the principle that where one party has referred another to a third person for information, or where one party has made statements to another through an interpreter of his own selection, the statements of the person so referred to, or of the interpreter so chosen, are competent evidence against the party, in the same manner as if he had made the statements himself. See 1 Greenl. Ev., secs. 182, 183.

The interpreter, on the trial of the cause before the justice, we may assume, was duly sworn, because the law required that he should be sworn. He translated what the appellant testified to in the German language into English, and in the latter language delivered it to the justice and the jury. To this extent the interpreter was a witness, and the case falls clearly within the rule that regulates the introduction of evidence of what a witness testified to on a former trial. The rule is, that such evidence is inadmissible unless the witness be dead, out of the jurisdiction, or is insane or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party. 1 Greenl. Ev., sec. 163.

There was no reason whatever shown why the interpreter could not be produced, and, therefore, there was no foundation laid for the introduction of evidence of what he swore to on the former trial; in other words, of the interpretation he gave of the plaintiff's evidence on that trial. The evidence, therefore, was incompetent, and should have been stricken out on the motion of the appellant, which seems to have been made as soon as it was ascertained that the wit-

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ness Smith was testifying to what the interpreter said, instead of what the appellant said.

But it is insisted that the bill of exceptions does not exclude the presumption which may be indulged in support of the proceedings, that the interpreter was afterward called and sworn as to what the appellant stated on the former trial. If that were done, it would not render the evidence of the interpretation he gave of the appellant's testimony competent, nor purge the record of the error in the admission of that evidence.

Again, it is urged that the appeal is vexatious, and grows out of a litigious spirit, and that we should apply to the case the legal maxim "*de minimis non curat lex*," and affirm the judgment below. However much we might be inclined to do so, we find a statute in our way, which allows an appeal to this court in actions originating before justices of the peace, where the amount in controversy, exclusive of interest and costs, exceeds ten dollars. Many of these little cases arising before justices of the peace involve as difficult questions as cases of more magnitude and importance, and take up the time of the court which could be better employed in the consideration of more important cases. But while the statute stands we must obey its behests, and pass upon questions presented, though the cases themselves be trifling and insignificant.

Again, it is urged that the judgment should be affirmed on the ground that the merits of the case have been fairly tried and determined.

But no court can correctly say that the merits of a case have been fairly tried and determined, where incompetent, and therefore illegal, evidence has been admitted upon such trial. The court cannot say that the illegal evidence had nothing to do in producing the result.

The bill of exceptions clearly presents the question as to the competency of the evidence of Smith, and, as we have seen, that evidence was incompetent.

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The court below should have granted a new trial, with costs to abide the event of the suit.

The judgment of reversal heretofore pronounced is adhered to, and the petition for a rehearing overruled.

R. S. Taylor, for appellant.

J. Colerick, W. G. Colerick, and H. Colerick, for appellee.

THE BOARD OF COMMISSIONERS OF BROWN COUNTY v. SUMMERFIELD.

CHANGE OF VENUE.—Clerk's Fees.—Criminal Law.—The clerk of a county to which a criminal case is removed by change of venue is not entitled to any fees to which the clerk of the county from which the case comes would not have been entitled if the case had been tried where it originated.

SAME.—Allowance of Claims.—The order of the court making an allowance for expenses and claims against the county from which a criminal case has come by change of venue, is *prima facie* evidence of the amount due, in all cases where the claims are such as are recognized by law.

SAME.—Statutes.—Sections 99 and 100 of chapter 54 of the code of 1843, p. 1002, were continued in force by section 172, 2 G. & H. 428.

APPEAL from the Brown Circuit Court.

BUSKIRK, J.—The case made by the record is this: Ambrose D. Cuning, Samuel Boriff, John M. Matheny, George W. Prosser, and Payne and Long, were indicted in Brown county for violations of the criminal laws of this State. Upon the application of the defendants, the venue was changed to Jennings county, where the defendants were tried and acquitted.

After the cases were disposed of, the court in Jennings county made the following order, which was entered of record, namely:

"And now at this time the court settles and allows the following fees and charges in the following State prosecutions, disposed of in this court upon change of venue from

38	543
140	419
142	682
38	543
153	373
38	543
157	48

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the county of Brown and State of Indiana, which is now settled and allowed against said county, to wit: The State of Indiana *v.* Ambrose D. Cunning. Amount expended by and due to Jennings county, twenty-three dollars and fifty cents; Johnson W. Summerfield, clerk's fees, thirteen dollars." The same order was made in the case of Boriff.

In the case of Payne and Long no allowance was made to Jennings county, but there was allowed to Johnson W. Summerfield, for his fees as clerk, twelve dollars and fifty cents.

In the case of John M. Matheny the same order was made as in Payne and Long, except that the amount allowed to Summerfield was fourteen dollars and eighty cents.

In the case of Prosser the same order was made as in case of Matheny.

These orders and allowances were certified under the hand and seal of the clerk of Jennings county. The above claims were presented in the name of Johnson W. Summerfield, as a claim against the county of Brown, before the Board of Commissioners of said county.

The Board allowed in favor of Jennings county the sum of forty-seven dollars, but refused to allow anything for the fees of Summerfield, as clerk of Jennings county. From this order Summerfield appealed to the circuit court.

In the circuit court the case was, by the agreement of the parties, tried by the court, and resulted in a finding for Johnson W. Summerfield in the sum of one hundred and fifteen dollars and ten cents, that being the whole amount allowed by the Jennings Circuit Court.

The court overruled a motion for a new trial and rendered judgment on the finding. From this judgment the appellant appealed to this court.

Three errors are assigned: first, refusal of the court to strike out of the complaint all that related to the fees of the clerk of Jennings county; second, the overruling of three separate motions, assigning different causes, to dismiss the action; third, the overruling of the motion for a new trial. The motions to strike out and to dismiss and the rulings of

the court thereon are not presented by a bill of exceptions, and therefore constitute no part of the record, and cannot be considered by this court.

The only available error assigned is the overruling of the motion for a new trial.

The only evidence offered on the trial was the certified order and allowance of the Jennings Circuit Court. Did the evidence sustain the finding and judgment of the court?

It is conceded that neither the revision of 1852 nor any subsequent act contains any provision whatever, as to whether the expenses of such trials shall be borne by the county where the offence is alleged to have been committed and the prosecution is instituted, or by that to which the venue is changed, and where the trial was had.

In *The Board of Commissioners of Lawrence County v. The Board of Commissioners of Floyd County*, 28 Ind. 538, this court held, that sections 99 and 100, of chapter 54 of the code of 1843, p. 1002, were continued in force by section 172, 2 G. & H. 428.

Sections 99 and 100, of the code of 1843, read as follows:

"Sec. 99. In all changes of venue under the provisions of this article, the county from which the change was taken shall be liable for the expenses and charges of removing, delivering, and keeping the prisoner, the per diem allowance of the associate judges, and the expenses of the jury trying the cause, the necessary expenses incurred by or on account of the officers, attending such trial, and of the whole panel of jurors in attendance during the time of such trial, and all other expenses necessary and consequent upon such change of venue and the trial of such defendant."

"Sec. 100. All costs and charges specified in the last preceding section, or coming justly and equitably within its provisions, shall be audited and allowed by the court trying any such cause; but where specific fees are allowed by law for any duty or service, no more or other costs shall be

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allowed therefor than could be legally taxed in the court from which such change was taken."

It is earnestly maintained by the appellee, that the order of the Jennings Circuit Court, settling and allowing the costs and charges was final and conclusive, not only as to the sums allowed, but as to the right of the persons in whose favor such allowances were made, to recover the sum allowed, against the county from which such change of venue was taken. We cannot concur with that view of the law. To make an order or judgment of a court final and conclusive, it is necessary that the party to be affected should be a party to the record. The action of the Jennings Circuit Court in making such allowance was *ex parte*. The Board of Commissioners of Brown county was in no sense a party to such proceeding. We think that the evident meaning of the legislature was that the court trying the cause should settle and determine the number of days that the jurors and associate judges were engaged in such trial, and the expense of removing, delivering, and keeping the prisoner, and the sums that the officers of the court were entitled to. We think that the allowances by the court do not conclusively determine the rights of the persons affected thereby, but the sums allowed will be presumed to be correct as to amounts, where the persons to whom such allowances were made were legally entitled to costs or charges. The sums allowed will be found *prima facie* evidence as to amounts, but not as to the legal right of the parties to such allowances. Suppose that the Jennings Circuit Court had made an allowance to the Prosecuting Attorney of that circuit for his fees, where the defendant was acquitted, or to the witnesses on behalf of the State and defendant, they not being poor persons, could it be successfully maintained that Brown county would be concluded by such allowances? We think not, because such allowances would be against the law, and could receive no validity from the unauthorized and illegal action of the court. When a person under the law was entitled to some allowance, the sum settled and allowed by the court will be

prima facie evidence as to the correctness of the amount allowed; but where the person in whose favor such allowance is made is not, under the law, entitled to either fees, charges, or expenses, then such allowance will be void. The Circuit Court of Jennings county had no power to create a liability against the appellant; but where there was a legal liability, that court had the power to settle and allow the sums due to the respective parties, and such allowance would be presumptive evidence that the sums allowed were correct, and, in the absence of evidence attacking such allowance on the ground of mistake or fraud, should be deemed sufficient evidence by the Board of Commissioners of the county against whom such allowance was made.

The appellant has pressed upon our consideration, with great earnestness and much ingenuity, many reasons why we should overrule the case of *The Board of Commissioners of Lawrence County v. The Board of Commissioners of Floyd County, supra*, but we are not inclined to disturb the ruling in that case. We adopt the language of this court in that case, where it is said: "It seems eminently proper that some definite provision should exist by statute, for the payment of the expenses incident to such trials, on change of venue. This is done by the sections referred to in the code of 1843, but is omitted in the code of 1852."

Regarding secs. 99 and 100 of the code of 1843 as in force, the question recurs, was the clerk of Jennings county entitled to the allowance made to him by the circuit court of that county? Section 99 is broad and comprehensive enough to embrace an allowance to the officers of the court where a criminal cause was tried on change of venue, but that section is very materially modified and restricted by the proviso in section 100. These two sections are to be construed together.

It is provided in section 100, that, "but where specific fees are allowed by law for any duty or service, no more or other costs shall be allowed therefor than could be legally taxed in the court from which such change was taken."

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Were any specific fees allowed by law to the clerk of Jennings county, for the duty or service rendered by him in said criminal trials? For if such specific fees were allowed, then the clerk of Jennings county was not entitled to an allowance for more or other costs than could be legally taxed in favor of the clerk of Brown county, if the case had been tried in that county.

It is provided by section 25 of the act of March 2d, 1855, p. 113, that, "in all criminal prosecutions, when the person accused shall be acquitted, no costs against such person, nor against the State or county," (shall be taxed) "for any services rendered in such prosecutions by any clerk, sheriff, coroner, justice of the peace, constable, or witness, but in all cases of conviction such fees and costs shall be taxed and collected as in other cases, from the person convicted."

This statute is a re-enactment of the one of March 2d, 1852. 1 G. & H. 338, sec. 25.

By the above section specific fees are allowed the clerk for the services rendered in criminal prosecutions in case of conviction, but none are allowed when the person accused is acquitted. The manifest intention of the legislature was to allow to the clerk and sheriff of the county where the case was tried, the same fees, no more or other than such officers could have charged if the case had been tried in the county where the offence was committed. If the indictments against Cuning and the other persons above named had been tried in Brown county, the clerk of that county could have taxed costs against the defendant in case of conviction, but none in case of acquittal.

Under section 25, of the act of March 2d, 1855, no costs could be taxed against the State, county, or person accused, in case of acquittal. It is to be presumed that the acts of March 2d, of 1852 and 1855 were passed in view of the fact that section 172 of the code had continued in force sections 99 and 100 of the code of 1843.

We are of the opinion that the clerk of Brown county could have taxed no fees against the State, county, or per-

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sons accused, in case of acquittal, if the said cases had been tried in that county, and that it was not the intention of the legislature to allow fees or compensation to the clerk of a county to which a change of venue was granted, when the clerk of the county from which the change was taken had no right to tax any fees.

We are clearly of the opinion that the circuit court of Jennings county had no power to make an allowance to the clerk of that county for the services rendered by him in such criminal prosecutions, and that the circuit court of Brown county erred in overruling the motion for a new trial.

There is no dispute about the facts, and they are all in the record. The justice of the case does not demand a new trial.

The judgment is reversed, with costs against the appellee; and the cause is remanded, with directions to the court below to render a judgment in favor of Jennings county for forty-seven dollars, and against the appellee on his individual claim and for costs.

J. S. Hester, for appellant.

J. N. Kerr, for appellee.

HARDY and Others v. OVERMAN.

MORTGAGE.—*Surviving Partner.—Assets.*—An answer to a suit on a promissory note and to foreclose a mortgage securing the same, executed by the ancestor of the defendants, that although executed by him, it was for the debt of a firm of which he was a member, and that there were firm assets to apply on the claim, and asking that the plaintiff be required to first exhaust such assets, was held insufficient on demurrer.

APPEAL from the Cass Common Pleas.

DOWNEY, J.—This was a suit by the appellee against the appellants, who are the heirs and administrators of David S. Chesnut, deceased, to foreclose a mortgage executed to him by the decedent. A copy of the note and mortgage was

filed with the complaint. The defendants demurred to the complaint, because it did not, as they alleged, contain facts sufficient to constitute a cause of action. This demurrer was overruled, and an exception taken.

Some of the heirs answered, setting up that the mortgage debt, though the note and mortgage were executed by David S. Chesnut, deceased, alone, was a partnership debt of a firm composed of the deceased and John S. Chesnut, a son of the deceased, who was one of the defendants; that there were partnership assets of the late firm, in the hands of the surviving partner, sufficient to pay the debt; and insisting that the plaintiff should first resort to the partnership assets, and only be allowed to go upon the mortgaged premises in the event that the debt could not be made out of such partnership assets. They also filed a cross complaint setting up the same facts and asking the same relief. Separate demurrers were filed to the answer and cross complaint, and sustained by the court, and exception taken. Thereupon, final judgment was rendered for the plaintiff.

The first alleged error is the overruling of the demurrer to the complaint. No objection to it is pointed out or insisted upon in the brief of appellants' counsel, and we are unable to find any defect in it.

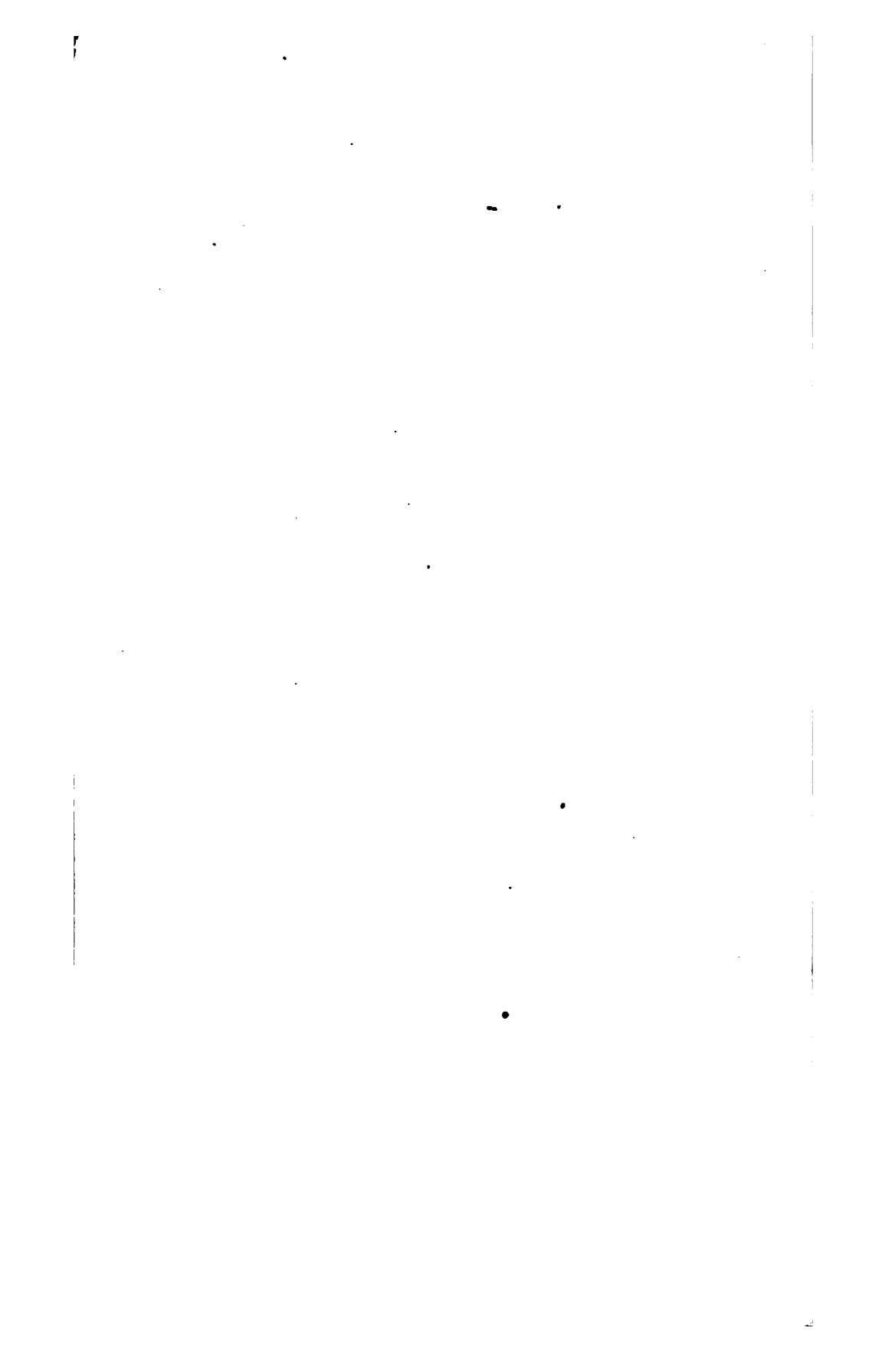
The other error assigned, presenting the point arising out of the sustaining of the demurrers to the answer and cross complaint, is settled by the case of *Dean v. Phillips*, 17 Ind. 406, against the appellants. The following language is used in that case: "The creditors of a firm may collect their debts out of the property of one of its members, unless that member has separate creditors who are entitled to be first paid out of his separate effects. If there be no such separate creditors, no one's equitable rights are interfered with by the levy on such separate effects. So far as the partner himself is concerned, his separate property is equally liable with the joint property, both in law and equity, for the payment of the joint debts. Partnership debts are regarded in equity as joint and several. The rule above stated" (that is, in a

preceding paragraph of the opinion) "was not established for the benefit of the partners, but for the benefit of the creditors." The heirs of the mortgagor in the case under consideration can stand in no other position than that occupied by their ancestor. It is very clear to us that the decedent having executed the note and mortgage in his own name, whether the proceeds or consideration of the note were for the benefit of the firm or not, the plaintiff had a right to foreclose his mortgage and make his money out of the mortgaged premises.

The judgment is affirmed, with ten per cent. damages and costs.

D. H. Chase, D. Turpie, and D. P. Baldwin, for appellants.

D. P. Jenkins and A. M. Flory, for appellee.



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2. *Same.—Appropriation of Real Estate.—Damages.*—Where the land of the citizen is not actually appropriated in the making of such improvements, the owner is not entitled to have the damages first assessed and tendered; but where it becomes necessary in making such improvements to appropriate and use the real estate of a citizen, his damages must be first assessed and tendered.....*Ibid.*
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- and this order must be followed by an advertisement for proposals to do the work, and there must be a written contract made and reported to, and approved by, the common council.....*Ibid.*
4. *Same.—Power of Council to Establish Grade.*—The common council of a city has the right to establish the grade of a street, and may cause the same to be excavated at one point and filled at another, and the earth, gravel, or stone excavated at one point may be used in making a fill at another point in said street.
Ibid.
5. *Same.—Improvement of more than one Street.*—Where the common council has taken the proper steps for the improvement of a particular street, it has no power to order the cutting down of another street, where no improvement is authorized, for the purpose of obtaining gravel or dirt to make the improvement contemplated. But where the council has established the grades of different streets, and has ordered their improvement in conformity to the grades established, the earth, gravel, and stone excavated on one street so ordered to be improved may be used in filling up a low place in another street where such improvement is authorized. In such case the excavation in one street and the fill in the other are each for the improvement of the respective streets.....*Ibid.*
6. *Same.—Removal of Earth from Streets.—Liability of City for Damages.*—A. being the owner of lots bounded by two streets, in a city organized under the general law for the incorporation of cities, the common council contracted with B. to make a fill of earth upon another street in said city not contiguous to said lots, and ordered and permitted the contractor to remove earth from a part of one of the streets along the line of said lots, to make such fill, such earth not being required or used for the improvement of the streets along which the lots were located, and the removal thereof greatly injuring said streets and damaging said lots. No order had been made or ordinance adopted by the common council for the improvement of the street to which the earth was taken, prior to the contract or removal of the earth.
Held, that the owner of the lots could maintain an action against the city for the injury resulting to the lots from the removal of said earth.....*Ibid.*
7. *Church Property.—Assessments for Construction of Sewers.—Exemption.* A building and the ground upon which the same is situated, used for religious purposes, are not liable to assessment to contribute to the cost of the construction of sewers in a city. Such property not being valued and assessed upon the tax duplicate for state and county or city taxes, no method is provided by law for its assessment for the purpose of sewerage. *The First Presbyterian Church of Ft. Wayne v. The City of Ft. Wayne et al.*.....338
8. *Grading of Streets.—Consequential Damages.*—Where a street, alley, or sidewalk is graded in a careful manner, pursuant to an ordinance, or resolution, or motion duly passed by the proper vote of the city council, the owners of lots contiguous thereto have no right to compensation for consequential damages to such lots, unless such damages are expressly given by statute; and when thus given, compensation must be sought in the manner prescribed by statute. *City of Terre Haute v. Turner*.....522
9. *Obstruction of Street.*—A city has the power to prevent improper obstruction of streets and sidewalks.
Ibid.

COLLATERAL PROCEEDING.

See RAILROAD, 10.

COLLATERAL SECURITY.

See PROMISSORY NOTE, 2.

CONSIDERATION.

See SUBSCRIPTION, 1.

CONSTABLE.

See JUSTICE OF THE PEACE,

CONSTITUTIONAL LAW.

Fourteenth Amendment to Constitution of the United States. See CRIMINAL LAW, 4.

1. *License to Vend Foreign Merchandise. Constitution of the United States.—Non-Residents of this State.*—The provision contained in "an act concerning licenses to vend foreign merchandise, to exhibit any caravan, menagerie, circus, rope and wire dancing, puppet show, and legerdemain," 1 G. & H. 424, which requires a license fee to be paid by travelling merchants and pedlars, who are not residents of this State, to vend foreign merchandise, is not in conflict with the clause of the constitution of the United States which declares that "Congress shall have power to regulate commerce with foreign nations, and among the several states." Article 1, section 8, clause 3. It is not in conflict with the prohibition in clause 3, article 1, section 10, of that constitution, declaring that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" nor is it in conflict with the provision, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," section 2, article 4. *Sears et al. v. The Board of Commissioners of Warren Co.*.....267
2. *Same.—Constitution of this State. Citizens.—Non-Residents.*—The provision, in the constitution of this State, that "the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens," section 23, article 1, has no application to non-residents or persons who are not citizens of this State, and who are doing business in the State. *Ibid.*
- ceedings for contempt. *Whittem v. The State*.....196
2. *Same.—Stay of Proceedings.*—This right of appeal does not deprive inferior courts of the power to inflict immediate and summary punishment for contempt; for, being a criminal proceeding, an appeal will not stay or supersede the judgment.....*Ibid.*
3. *Same.—Power to Punish for Contempt.*—The power to punish for contempt is conferred upon the courts of this State by statute, and the language of the statute embraces both direct and constructive contempts.....*Ibid.*
4. *Direct Contempt.*—A contempt is direct when committed before and in the presence of the court, or so near to the court as to interrupt the proceedings thereof; and such contempts are usually punished in a summary manner, without evidence, but upon view and personal knowledge of the presiding judge.....*Ibid.*
5. *Constructive Contempt.*—Contempts are constructive, when they are committed, not in the presence of the court, and tend by their operation to interrupt, obstruct, embarrass, or prevent the due administration of justice..... *Ibid.*
6. *Same.—Practice.*—The proceeding against a party for a constructive contempt must be commenced by either a rule to show cause, or by an attachment; and such rule should not be made, or attachment issued, unless an affidavit is filed specifying the acts committed by the person accused of the contempt.....*Ibid.*
7. *Same.—Trial.*—When the rule or attachment has been served, the person accused has the right to be heard by himself and counsel. If the contempt is admitted, the court may render judgment on such admission, but if the defendant denies that he committed the acts complained of, or insists that they do not constitute a contempt, the court should hear the evidence, and determine the guilt or innocence of the party.....*Ibid.*
8. *Same.—Seduction.*—If, in an action by an infant female by next friend for her seduction, the defendant by threat or intimidation induces the plaintiff, said infant, to leave court, or abducts her against her will, he will be guilty of a contempt of court; but if she goes away of her own free will and ac-

CONTEMPT.

See JUSTICE OF THE PEACE, 1.

1. *Proceeding for Contempt.—Criminal Law.—Appeal.*—A proceeding for contempt is a criminal proceeding, and our statute gives an appeal to the Supreme Court from all final judgments in criminal cases, and this right of appeal includes judgments in pro-

cord, without persuasion or coercion on the part of the defendant, the fact that he, at her own request, aids and assists her to get away, will not make him guilty of contempt.....*Ibid.*

9. *Same.—Release from Imprisonment.*—If a defendant, while imprisoned on a charge of having abducted the plaintiff, files affidavits conclusively showing that there has been no abduction and no contempt, it is error to refuse to set aside the judgment and admit him to bail.....*Ibid.*
10. *Same.—Imprisonment.*—The imprisonment for contempt must be for a certain and definite time, or must expire on the performance of a condition.....*Ibid.*
11. *Same.—Cases Overruled.*—The case of *The State v. Tipton*, 1 Blackf. 166, and subsequent cases holding that an appeal will not lie in a case of contempt, are upon that point overruled.....*Ibid.*

CONTRACT.

See CORPORATION, 1; DAMAGES; MATERIAL MAN; PLEADING, 2, 3, 4; PROMISSORY NOTE, 3; REAL ESTATE, RECOVERY OF, 1; SUBSCRIPTIONS, 1; TORT.

1. *Defective Manufacture.—Waiver. Settlement.*—Suit on a promissory note. Answer, first, that the consideration of the note was the manufacturing by the plaintiff for the defendant, of fifty fanning mills after a certain pattern mill furnished by the defendant to the plaintiff, the defendant to furnish certain materials, which was done, and to pay ten dollars for each mill, and one hundred dollars and fifty cents was so paid; that the mills were to be constructed in a workmanlike manner, according to the model; that the plaintiff failed to construct the mills in a workmanlike manner and according to model, stating defects; that defendant owned the right to make and sell mills of that model in this State, and expended three hundred dollars in attempting to sell the mills so furnished by the plaintiff, but the imperfect construction destroyed the sale; that he had received on the contract twenty-three mills only, and had contracted for the sale of fourteen there-

of, and was ready to return the remaining nine to the plaintiff, as they were worthless; that he had expended four hundred and fifty dollars in materials required to be furnished by him; and that the defective workmanship of the plaintiff had destroyed the sale of all mills of that model; otherwise he could have sold all contracted for and a much larger number, at thirty-five dollars each; that the money expended in attempted sales and in material was lost, and the value of the patent destroyed, through the negligence of the plaintiff in the manufacture of the mills; wherefore he demanded judgment for fifteen hundred dollars.

The second paragraph of answer was a general denial, and the third, want of consideration. The reply was, first, a denial; and in the second paragraph, which was directed to the first and third paragraphs of answer, the plaintiff alleged that the mills were manufactured during the summer and fall of 1867, under the direction of A., the authorized agent of the defendant, who was satisfied with and received the mills, and sold twenty-three of them; and that afterward the defendant, after he had seen and examined them, and knew the manner of the manufacture, executed the note in question in settlement of the contract.

Held, that the second paragraph of reply was sufficient. *Hunter v. Leavitt et al.*.....141

2. *Instruction.—Waiver of Defects.—Agent.*—The court, after instructing the jury that the reply was sufficient, proceeded: "If, therefore, you find from the evidence that the mills in question were built under the direction of the defendant's agent, and that said agent knew, or might have known, the character of the workmanship, and the conformity or non-conformity of said mills to the model, and received said mills for his principal, and sold part of them, and that defendant, after having seen and examined said mills, being fully advised as to the manner in which they were made, gave his note for the same, such acts of the principal and agent would be a waiver in law of any objection to the performance of said contract by the plaintiff."

Held, that this instruction was correct.....*Ibid.*

3. *Same.—Change of Contract.*—The court also charged the jury: "If you believe, from the evidence that the defendant, through his agent, contracted with the plaintiff to construct fifty fanning mills, according to a model mill, each supplying part of the materials, and if you further find that said agent, in making said contract, stipulated with plaintiff to make certain changes in said manufactured machines, from the model mill, such acts would be within the scope of the agent's authority and binding upon the defendant; and if you find from the evidence that said agent, in contracting with the plaintiff for the construction of said mills, directed changes to be made from the model mill, the defendant would be concluded by the act of the agent, and liable to pay the contract price, if the plaintiff constructed said mills to correspond with the model, except as to changes made by the direction of the defendant's agent, if such changes were made to conform to the direction of the agent."

Held, that as, under the evidence, the charge, if technically wrong in the abstract, upon which point no opinion is expressed, could not have operated to the injury of the defendant, the judgment could not for such an error be reversed.....*Ibid.*

4. *Evidence.—Declaration of Agent.* On the trial, the plaintiff was permitted to state, that A., the agent, when he received the machines, declared "that he was satisfied, and that they were a smooth, nice job," evidence having been given of the acceptance by the defendant of the machines and the execution of the note by him afterwards.

Held, that there was sufficient foundation for the admission in evidence of said declaration of the agent....*Ibid.*

5. *Same.—Letter of Agent.*—The defendant offered a letter written by A. to him.

Held, that it was not proper evidence, as the agent could not make evidence for his principal; or if not acting as his agent, still he could not bind the plaintiff, no proof being shown that he acted for him.....*Ibid.*

6. *Assignment.*—Where a written

promise was given to pay to a railroad corporation a certain sum of money, when its road should be completed through a particular county, *provided*, it should run through lands owned by A. in a designated locality;

Held, that such contract was assignable without indorsement, and the purchaser might maintain an action thereon in his own name. *Hays v. Branham et al.*.....219

7. *Pleading.—Performance of Conditions.*—In a suit on such contract, an averment, "that accepting and acting on said agreement and subscription, said company did construct and build such railroad, and that the same was so far completed in accordance with said contract and agreement that, on," etc., "the same was ready for running cars thereon through said county," was held not a sufficient averment of performance of the conditions of the contract to entitle the plaintiff to recover.....*Ibid.*

8. *Same.—Evidence.*—Where the maker of such written contract, in a suit against him for its enforcement, answered that his agreement contained other stipulations and conditions as set out in a conditional subscription paper made a part of the answer, executed by others, to which he was not a party; and that the plaintiff had not performed said stipulations and conditions;

Held, that a demurrer was properly sustained to the answer, nor could such evidence be admitted on the trial.

Held, also, that evidence that the road did run through the designated lands of A. could not be admitted under the averments of the complaint.....*Ibid.*

9. *Mistake.—Correction of.*—To entitle a plaintiff to have a mistake in reducing the terms of a contract to writing corrected, it is not necessary that he should allege and prove that the mistake was such as he could not have obtained a knowledge of by reasonable diligence when he was put on inquiry. *Monroe v. Skelton.*...302

10. *Reformed.—Specific Performance.* Although a plaintiff cannot have specific performance of a written contract, with a variation upon parol evidence, still he may, under the code, in the same action, upon parol evi-

dence, have the written contract reformed and enforced.....*Ibid.*

11. *Same.—Suit to Cancel Deed.—Title to Land.*—Where the object of a suit is to reform a contract, and to set aside and cancel a sheriff's deed taken by the defendant in violation of the terms of the agreement, the deed conveying whatever interest the plaintiff had in the property, it is not necessary for the plaintiff to show a title to the land conveyed to have been in him, to entitle him to the relief he demands.....*Ibid.*

CONVEYANCE.

See REAL ESTATE, RECOVERY OF, 4, 5.

CORPORATION.

See CITY; DRAINING ASSOCIATION; INSURANCE; SUBSCRIPTION, 1, 2; TOWN; TURNPIKE.

1. *Turnpike.—Injunction.—Directors as Contractors.*—Where a complaint was filed to enjoin the directors of a gravel road company from paying any money on a contract for the construction of the road, and the county treasurer from collecting the taxes, alleging fraud, irregularity, and unfairness, and that the contracts were given to two persons, one of whom was a director of the company, and that the other had an illegal and corrupt understanding with the directors that he was to share the profits with them;

Held, that a director of an incorporated company cannot become a contractor with the company, nor can he have any personal or pecuniary interest in a contract between a company of which he is a director and a third person. *Port et al v. Russell et al.* 60

2. *Foreign Corporation.—Express Company.—Insufficient Statement.—Liability of Agent.*—Where a foreign express company doing business in this State has failed to file in the proper recorder's office a statement, which is a full compliance with the requirements of the statute, stating the amount of capital employed in its business; although such company cannot recover on a bond given by an agent for the discharge of the duties of said agency, still it may

maintain an action against the agent to recover for money received in the course of his agency to the use of the company. *The U. S. Express Co. v. Lucas et al.*.....361

COSTS.

See SUPREME COURT, 9, 10; VENUE, 1, 2, 3.

1. *Title to Real Estate.—Bill of Exceptions.*—In an action in which under the pleadings, or under an agreement of the parties, evidence may be introduced bringing in issue the title to real estate, and yet the suit may be determined without such evidence, the Supreme Court will look to the bill of exceptions to determine from the evidence whether that issue was before the jury, and will decide the question of costs between the parties accordingly. *Holmes v. Wright*.....383
2. *Trial by Court.*—Where the court tries a case, it takes the place of a jury, and the question of costs is no part of the finding, but of the judgment upon the finding, and the law as applied to it, and the character of the evidence upon which it is based. *Ibid.*

COUNTER CLAIM.

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COUNTY CLERK.

See BILL OF EXCEPTIONS, 3; SUPREME COURT, 9, 10, 11; VENUE, 1, 2, 3.

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COUNTY TREASURY.

When money is paid into the treasury of a county, it must remain there until paid out in the manner prescribed by law. *Shoemaker v. B'd of Comm'rs of Grant Co. et al.*.....175

CRIMINAL LAW.

See CONTEMPT; VENUE, 1, 2, 3.

1. *Assault and Battery with Intent to Rob.—Declarations of Defendant. Evidence of Intent.*—Where evidence of an act done by a party is admissible, his declarations made at the same time, having a tendency to elucidate, explain, or give character to the act, are also admissible; accordingly, in a trial for assault and battery with intent to commit a robbery, witnesses for the State, in answer to questions put by the State, having testified that, while the assault and battery was being committed, the prisoner told the said witnesses, that three years before, the person upon whom he was then perpetrating the offence had assaulted him and drawn a pistol on him, and he, the prisoner, was now having his revenge for it, it was error for the court to instruct the jury, that the declaration of the defendant was not to be considered by them as evidence of the intent with which the assault was committed. *Hamilton v. The State*.....280
2. *Same.—Merger.—Trial for One Offence a Bar.*—The offence of assault and battery with intent to rob is not merged in the crime of robbery. Both offences are of the same grade, and if the doctrine of merger applies in this State to criminal offences, it certainly does not apply where both crimes are a felony. The State may elect which offence shall be prosecuted, where the evidence is sufficient to sustain a charge for either, and a trial for one will operate as a bar to a prosecution for the other.....*Ibid.*
3. *Same.—Evidence.*—Evidence that the party assaulted had no money in his possession, where the charge was assault and battery with intent to rob of a five dollar bank note, was held no defence.....*Ibid.*
4. *Marriage Between Whites and Negroes.—Fourteenth Amendment.—Civil Rights Bill.*—Neither the Fourteenth Amendment to the Constitution of the United States nor the Civil Rights Bill, passed by Congress, has impaired or abrogated the laws of this State on the subject of the marriage of whites and negroes. Such a union between members of the different races is a criminal offence by the statutes of this State. *The State v. Gibson*.....389
5. *Indictment.—Embezzlement and Grand Larceny.—Trial.*—Where a defendant is indicted in separate counts in the same indictment for embezzlement and grand larceny, it is not error for the court to refuse to require the State to elect on which count he shall be tried. *Griffith v. The State*.....406
6. *Plea of Guilty.—Motion to Withdraw Plea.*—Where a plea of guilty had been accepted by the court, and sentence had been pronounced thereon;
Held, that it was not error to refuse a request by the defendant to withdraw the plea, without any reason stated, made the next morning, and before the record of the proceedings was signed.....*Ibid.*
7. *Plea of Guilty.—Confession.—Judgment.*—After a plea of guilty, or a confession of guilt in open court, no finding is necessary, but the judgment follows the plea or confession.....*Ibid.*
8. *Indictment.—Perjury.*—Where an indictment for perjury did not purport to set forth a copy of an affidavit, in the making of which the perjury was charged to have been committed, or of any part thereof, or set out the tenor of such affidavit in whole or in part, but only set out the substance thereof;
Held, that the indictment was, for this reason, fatally defective, and should have been quashed on motion. *Coppack v. The State*.....513

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2. *Defect of Parties.*—A demurrer assigning for cause that the complaint does not state facts sufficient to constitute a cause of action, does not present the question of defect of parties.....*Ibid.*

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Motion to Suppress.—When evidence may be introduced on the trial, which may make the answers to certain interrogatories in a deposition admissible, it is proper that a motion to suppress should not be decided, until on the trial the court is informed whether or not such evidence will be offered. *The B. & O. R. R. Co. v. McWhinney et al.*.....436

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Held, that the answer did not allege a valid prior assessment. *The Nevins, etc., Draining Co. v. Alkire*.....189
2. *Same.—Lands not Assessed.*—The omission to assess lands subject to assessment under the provisions of the law for the construction of drains, renders the assessment made invalid. *Ibid.*
3. *Same.—Estoppel in Pais.*—An answer to a complaint for recovery of assessment levied by a draining company alleged a prior assessment; the reply alleged that the defendant requested and assented to the making of the new assessment, and that the company expended money in making the drain on the faith of the defendant's expressing satisfaction with the new assessment, and standing by while the improvement was made. *Held*, that the reply was good.....*Ibid.*

E

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2. *Interpreter*.—Evidence of what an interpreter testified as received by him in a foreign language from a witness, on a former trial, cannot be given by one who heard the translation by the interpreter, unless the interpreter be dead, or insane, out of the jurisdiction, or sick, and unable to testify, or having been summoned, appears to have been kept away by the adverse party. *Scheerer v. Harber* 536

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1. *Administrator's Sale.—Purchase by Administrator.—Statute of Limitations*.—Where an action is brought by heirs to set aside a public sale of real property, made by an administrator under the order of the court, on the ground that he was the real purchaser of the property in the name of another party, the law does not grant the relief because the act is necessarily fraudulent, but because it is poisonous in its consequences; and therefore the statute limiting actions "for relief against frauds" does not apply. *Potter et al. v. Smith et al.* 231
2. *Same*.—Such a suit is not an action for the recovery of real property; and therefore the limitation to twenty years does not apply. *Ibid.*
3. *Same.—Limitation of Fifteen Years*. Such a suit, being embraced by no other statute, comes within section

212, 2 G. & H. 160, and must be brought within fifteen years. *Ibid.*

4. *Estoppel.—Heirs*.—Knowledge by the heirs of the purchase by the administrator, and their allowing him without objection to make valuable improvements, does not estop them. At most, he must be satisfied if he be repaid on the resale of the property. *Ibid.*

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1. *Fraudulent Conveyance.—Innocent Purchaser.—Notice.—Creditor*.—Where lands have been conveyed to defraud creditors, to an innocent purchaser, who, however, while owing the purchase-money, or part thereof, has notice of the fraud, creditors may bring an action to set aside the conveyance as fraudulent and subject the land to the payment of debts, to the extent of the unpaid purchase-money; and they are not limited to proceedings supplemental to execution. *Rhodes et al. v. Green et al.* 7
2. *Evidence*.—Fraud may be found from circumstances as well as positive evidence. *Ibid.*
3. *Resulting Trust.—Cestui que trust*. Where lands are purchased by one with the money of another, and the conveyance is made in the name of the former, without the consent of the latter, the lands are subject to a resulting trust in favor of the latter,

- and are not liable for the debts of the former *Ibid.*
4. *Creditor.—Warranty Deed.—Eviction.—Breach of Warranty.—Time.* Where the grantee of a warranty deed of real estate incumbered by judgments against former owners is evicted by the purchaser at sheriff's sale under such prior judgments, he is a creditor of his grantor, and is such from the date of the deed, and may sue to set aside conveyances made by his grantor to defraud creditors..... *Ibid.*
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year, and the court approved the sale at the May term, 1868;

Held, that the title to the property was in A.

Held, also, that the order for the sale of the land did not operate *in presenti*, and convert the land into assets in the hands of the guardian so as to prevent the judgment from operating as a lien on the land; nor did the title of the purchaser at guardian's sale relate back to the order of sale, so as to prevent any intervening liens or rights being acquired. *Shaffner, Adm'r, v. Briggs et al.*.....55

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3. *Same.*—*Statute.*—The act of March 6th, 1865, on this subject was not changed by the act of March 11th, 1867.....*Ibid.*

HUSBAND AND WIFE.

See WILL, 2, 10.

1. *Wife's Separate Real Estate.—Contract.*—Certain goods were sold and delivered to a married woman, doing business in her own name and right, with her own separate estate, and with the consent of her husband, and owning in her own right certain real estate as her separate property; and suit was brought against her to charge her estate with the value of said goods.

Held, that as there was no averment of an intent on the part of the married woman to contract with regard to her separate estate, or create a charge upon the income of her separate real estate, the action could not be sustained. *Hasheagen v. Specker et al.*.....413

2. *Mechanic's Lien.—Married Woman.—Separate Property.*—A complaint to enforce a mechanic's lien alleged that the defendants, husband and wife, were indebted to the plaintiff for work and labor done and materials furnished, as shown by a bill of particulars, in erecting a house on real estate belonging to the wife. Answer in denial, and plea of payment. Trial and finding for plaintiff. Motion in arrest of judgment by the wife sustained, and judgment in her favor.

Held, (DOWNEY, J., dissenting) that the averments of the complaint were not sufficient to charge the wife, but that all the particulars necessary to show the liability of the wife should have been expressly averred. *Black v. Rogers et ux.*.....420

3. *Witness.*—At common law, where the husband was excluded as a witness on the ground of interest, the wife was also excluded. The statute has not changed the rule that hus-

band and wife are incompetent witnesses for or against each other. Where the husband is made a party to answer to an assignment by him of a cause of action to the plaintiff, and the assignment is not questioned, the wife may testify as to other matters; but where the husband has a pecuniary interest in the result of the action, she cannot be a witness. *Stantley v. Stanton.*.....445

I

INDIAN RESERVATION.

See TAX, 5.

INJUNCTION.

See CORPORATION, 1; STATE BOARD OF EQUALIZATION, 2, 3, 4; TAX, 4.

INSANITY.

See WILL, 1 to 8.

INSURANCE.

1. *Mutual Insurance Company.—Receiver.—Assessment.*—An action by a receiver of an insolvent mutual insurance company, to collect an assessment on a premium note, cannot be sustained where the complaint shows on its face that neither the receiver nor the court to which he reports his action has examined and determined upon the validity of the claims against the company, for the payment of which the assessment is made. The amount of claims which the receiver or the court will allow as just demands against the company, together with any indebtedness previously allowed by the directors of the company, as shown by their books, must be ascertained, before an assessment can be made to pay such indebtedness. *Embree v. Shideler.*.....423

2. *Same.—Assessment.—Complaint.* The complaint to collect an assessment upon a premium note given to a mutual insurance company must show the time covered by the policy for which the note was given, and that the losses for which the assessment was made occurred during the existence of the policy.....*Ibid.*

INTERPRETER.

See EVIDENCE, 2.

INTERROGATORIES TO JURY.

See NUISANCE, 1; PRACTICE, 9.

Answers.—The court instructed the jury that if there was such a want of evidence as to any fact to which an interrogatory was directed that they could not determine the affirmative or negative, they should so answer.

Held, that the instruction was erroneous; that if there was evidence on the subject, the jury must determine or disagree. *Maxwell v. Boyne*. 120

INTERROGATORIES TO PARTY.

Pleading.—*Sham Answers.*—The court cannot examine the answers to interrogatories to determine whether an answer is a sham pleading or not. *Raleigh v. Tossett*. 295

J

JUDGMENT.

See APPEAL; CRIMINAL LAW, 7; GUARDIAN AND WARD, 1; HEIRS, 1; JURISDICTION; PRACTICE, 8; PRINCIPAL AND SURETY.

Motion to correct. See PRACTICE, 4, 19.

Non obstante veredicto. See PRACTICE, 6.

Bill to review. See PRACTICE, 7.

JUDICIAL DISCRETION.

See NUISANCE, 2; PRACTICE, 24.

JUDICIAL SALE.

See GUARDIAN AND WARD, 1; MINOR; VENDOR AND PURCHASER, 2.

JURISDICTION.

See HABEAS CORPUS; MANDATE; RAILROAD, 10; SUPREME COURT, 3, 5, 6.

Judgment.—*Process.*—A judgment rendered against a defendant not served with process, and who does not appear in person or by attorney,

is void. *Shoemaker v. B'd Comm'rs Grant Co. et al.* 175

JUSTICE OF THE PEACE.

1. *Contempt.*—A constable, having executions in his hands, the return day of which had passed, and money having been collected upon some of them, was required by the justice of the peace who had issued them to return them, but declining to do so immediately, he was committed for contempt to the county jail by the justice, although the trial of no cause was in progress.

Held, in a suit for this imprisonment, against the justice and the surety on his official bond, that the action could not be maintained against the surety, the act constituting no breach of the bond (DOWNEY, C. J., dissenting).

Held, also, that the executions with the returns thereon should have been admitted in evidence when offered by the defendants, to show the *animus* of the justice in what he did. *Dwyer et al. v. The State, ex rel. Altland* 111

2. *Appeal.*—*Separate Liability.*—Where a suit is brought before a justice of the peace against two persons on an account, and judgment is recovered against both, if one of the judgment defendants appeals, evidence showing his separate liability for the claim may be introduced on the trial of the appeal. *Carmien v. Whitaker* 509

3. *Attachment.*—*Garnishee.*—*Money paid on Condition.*—*Official Bond.*—*Pleading.*—Where a justice of the peace received money from a garnishee in an attachment proceeding against whom there was an order made to pay the money, and afterwards in a suit against the justice and the sureties on his official bond, on the relation of said garnishee, the complaint alleged that the money was paid to the justice, "to be held by him as such justice of the peace, until the final determination and adjudication of the rights of the respective parties connected with said cause, for the person entitled to said money and authorized to receive the same," and that the relator appealed from the judgment within thirty days, and the judgment was reversed, and

the relator demanded the money from the justice, who refused to pay;
Held, that the complaint did not show a cause of action against the justice and his sureties.
Held, also, that if a justice receive money to be held otherwise than as the law directs, his sureties are not liable. *The State, ex rel. La Plante, v. Woodman et al.*.....511

L

LARCENY.

See CRIMINAL LAW, 5.

LICENSE.

To vend foreign merchandise. See CONSTITUTIONAL LAW, 1, 2.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

M

MALICE.

See SLANDER, 1.

MANDATE.

Supreme Court. — Jurisdiction.—The Supreme Court has no jurisdiction to award a writ of mandate where said writ is not necessary to the proper discharge of the duties of said court as an appellate court. *The State, ex rel. Powell, Adm'r, v. Biddle*138

MARRIAGE.

Between Whites and Negroes. See CRIMINAL LAW, 4.

MATERIAL-MAN.

Contract for Building. — Assignment.—Where A. contracted for the building of a house and its delivery to him free from all liens of material-men, and took a bond to that effect from B., with sureties, and B., after partly erecting the building, abandoned his contract, being indebted to A. for over payment, and assigned the contract to C., one of his sureties, who completed the building;

Held, that A. was not rendered hable to one who had furnished materials to the building, by reason of a notice of such fact served upon him after he had thus overpaid B. *Raleigh v. Tossett*295

MECHANIC'S LIEN.

See HUSBAND AND WIFE, 2; MATERIAL-MAN.

MERGER.

See CRIMINAL LAW, 1, 2, 3; TRUST.

MINOR.

See PARTIES, 5; PRACTICE, 3.

Lands of Infant. — Execution.—The lands of an infant may be sold on execution against him. *Shaffner, Adm'r, v. Briggs et al.*.....55

MISTAKE.

See CONTRACT, 9, 10, 11.

MORTGAGE.

See PARTNERSHIP; TRUST; REDEMPTION; SINKING FUND.

Mortgage in Equity. See REAL ESTATE, RECOVERY OF, 2.

1. *Delivery.*—A mortgage takes effect from the time of its delivery. *Milliken et al. v. Ham*.....166
2. *Foreclosure. — Answer of want of Title in Mortgagor.*—In an action to foreclose a mortgage, the defendant answered, that at the time of the execution of the mortgage to the plaintiff, he, the defendant, had no title to the premises mortgaged, and that he had no title to the same at the time of filing said answer.
Held, that the answer was bad. *Plowman et al. v. Shidler*.....484

N

NEGLIGENCE.

See ATTORNEY.

NEW TRIAL.

See PRACTICE, 8; SUPREME COURT, 4.

Motion to Strike Out.—Bill of Exceptions.—Error of the court in ruling on a motion to strike out is not a reason assignable for a new trial, and can only be reserved by bill of exceptions; a new trial is only a judicial re-examination of the issues of fact, and not of questions presented in arriving at the issues, whether those questions were raised by demurrer to a pleading, or by a motion to strike out. *Milliken et al. v Ham*.....166

NUISANCE.

1. *Mill Dam.—Interrogatories.*—In an action to recover damages for the erection and maintenance of a mill dam which caused the overflow of the plaintiff's land, and asking to have the same abated as a private nuisance, the court submitted an interrogatory to the jury as to the height of the dam at the time of the trial, and also an interrogatory whether the dam was higher at that time than it was when the mill property was sold by the plaintiff to the defendant's grantor. To both of these interrogatories the plaintiff objected. *Held*, that the interrogatories were proper; that the answers might aid the court in determining whether the nuisance should be abated; but that the evidence on these points should not affect the question of the plaintiff's recovery of damages. *Maxwell v. Boyne*.....120
2. *Judicial Discretion.*—The discretion resting in the court as to ordering the abatement of a private nuisance is a legal discretion, to be exercised affirmatively whenever the interests or happiness of individuals or the community may require it. *Ibid.*

NUNC PRO TUNC ENTRY.

See PRACTICE, 4, 5.



OCCUPYING CLAIMANTS.

See SINKING FUND.

OFFICE AND OFFICER.

See TOWNSHIP TRUSTER.

OFFICIAL BOND.

See JUSTICE OF THE PEACE, 1, 3.

OPEN AND CLOSE.

See PRACTICE, 10, 24.

P

PARTIES.

See CONTRACT, 6; DEMURRER, 2; PRACTICE, 15, 21; RAILROAD, 8; RECEIVER; STATE BOARD OF EQUALIZATION, 2, 3, 4; WITNESS.

1. *Estoppel.*—In a suit against the payee of a note to have the same declared paid, the complaint recited that the defendant "claimed that he had sold and assigned the said note and mortgage to" a third party, "whom plaintiff makes defendant hereto;" and said third party filed an answer, to which plaintiff demurred, without moving to strike out the answer. *Held*, that plaintiff was estopped from denying that the person so answering was a proper party defendant. *Goldthwait et al. v. Bradford et al.*....149
2. *Action.*—No one can maintain an action unless he has some interest in the matter in controversy. *Shoemaker v. The B'd of Comm'rs Grant Co. et al.*.....175
3. *Same.*—The interest necessary to the maintenance of an action may be separate, or joint, or in common; if the interest is separate, then the action must be brought separately by each person interested. If the interest is joint, then all persons interested must unite as plaintiffs, but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. When the question involved is one of common or general interest to many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.....*Ibid.*
4. *Next Friend.*—The next friend who prosecutes for an infant cannot be regarded as a party to the suit;

- the infant is the party. *Whittem v. The State*.....196
5. *Same*.—*Seduction*.—An infant female, who by her next friend institutes an action for her own seduction is the plaintiff in the cause, and may or may not, as seems best to her, attend court and prosecute the suit. *Ibid.*
6. *Demurrer*.—A demurrer for want of proper parties must point out or name the person who is not, but should be, made a party. *Vansickle et al. v. Erdelmeyer*.....262

PARTITION.

Appeal.—In a proceeding for the partition of lands, the interlocutory decree for partition and appointment of commissioners does not constitute a final judgment; and no appeal can be taken to the Supreme Court in such proceeding till the coming in of the report of the commissioners and the judgment of the court thereon. *Davis et ux. v. Davis et al.*.....160

PARTITION FENCE.

See RAILROAD, 5.

PARTNERSHIP.

See PROMISSORY NOTE, 2.

Mortgage.—*Surviving Partner*.—*Assets*.—An answer to a suit on a promissory note and to foreclose a mortgage securing the same, executed by the ancestor of the defendants, that although executed by him, it was for the debt of a firm of which he was a member, and that there were firm assets to apply on the claim, and asking that the plaintiff be required to first exhaust such assets, was held insufficient on demurrer. *Hardy et al. v. Overman*.....549

PERJURY.

See CRIMINAL LAW, 8.

PLEADING.

See CONTRACT, 7; HUSBAND AND WIFE, 1, 2; INSURANCE, 2; INTERROGATORIES TO PARTY; PRACTICE, 5, 6, 7; PROMISSORY NOTE, 5;

RAILROAD, 7; REDEMPTION; SLANDER, 1 to 4; TORT; TURNPIKE, 5.

Divorce. See *Lewis v. Lewis*, 218.

1. *Argumentative Denial*.—Where a general denial has been filed as an answer, another paragraph of answer, which contains nothing but an argumentative denial and facts which could have been proved under the general denial, should be stricken out on motion; but a judgment will not be reversed for an error in this matter, where a demurrer has been sustained to such a paragraph. *Port et al. v. Russell et al.*.....60
2. *Contract*.—*Construction*.—*Reformation*.—Where in a pleading, it is sought to have a contract construed, and where it is sought, if the court does not place a particular construction upon it, which is averred to have been in accordance with the intention and understanding of the makers then to have such a reformation of the contract as shall render it susceptible of such an interpretation, the contract must be stated in full, with all material exhibits. *Plowman et al. v. Shidler*.....484
3. *Same*.—*Copy*.—*Performance of Contract*.—Where, in a pleading, a written contract is relied upon, the instrument must be fully set out, that the court may know what its terms are; and if the contract provide that under certain conditions there may be a partial rescission of the contract, all that such conditions required on the part of the pleader demanding rescission must be alleged to have been performed, or an excuse must be given for the omission.....*Ibid.*
4. *Contract*.—*Performance*.—In a suit to recover rent due on a lease of a house; *Held*, that it was a sufficient allegation of performance by the plaintiff, to aver the making of the contract, and that the defendant had been placed in possession of the premises and still retained possession thereof, and that a certain sum was then due for rent. *Mason et al. v. Seitz*.....516

PRACTICE.

See ACTION; ATTACHMENT; BILL OF EXCEPTIONS; CONTEMPT; CON-

TRACT, 10; COSTS; CRIMINAL LAW, 5, 6, 7; DEMURRER; DEPOSITION; INTERROGATORIES TO JURY; INTERROGATORIES TO PARTY; NEW TRIAL; PRINCIPAL AND SURETY; REPLEVIN; SUPREME COURT; WITNESS.

1. *Commencement of Action.—Summons.—Sheriff.*—The issuing of summons is the commencement of an action, and a summons is not issued until it comes to the hands of the sheriff. *Fordice et al. v. Hardesty et al.*.....23
2. *Trial.—Witness.*—Under our practice, the court or jury may find the affirmative of an issue, notwithstanding there may be but one witness on each side, and the evidence be conflicting. *Riley et al. v. Butler*.....51
3. *Verification of Pleadings by Infants.*—The statute requiring the verification of pleadings does not apply to infants. A verification by the next friend is sufficient. *Turner et al. v. Cook*.....129
4. *Motion to Correct Judgment.—Nunc Pro Tunc Entry.—Replevin.* In a suit to recover an article of personal property of the alleged value of three hundred dollars, with damages for its detention, upon an issue formed by an answer of general denial, there was a finding generally for the plaintiff, and, among other things, that the property was of the value of two hundred dollars and the damages nine dollars, and the clerk entered judgment only for the recovery of the property and damages, on the 3d day of December, 1869, and on the 27th day of the May term, 1870, said term having commenced on the 9th of May, the plaintiff moved the court to correct the judgment so that the plaintiff should recover the value of the property in case a delivery could not be had, and the plaintiff proved notice to the defendant of the motion on the 29th day of April, 1870, and the defendant moved to set aside the service, first, for want of a proper summons; second, because there was no proper service; third, because the complaint was not filed ten days before the first day of the term. The court refused to set aside the service. *Held*, that this ruling was correct. *Held*, also, that a demurrer to the motion

to correct the judgment was properly overruled. *Hebel v. Scott*.....226

5. *Same.—Pleading.—Evidence.*—The defendant then answered, first, a general denial; second, that the value of the property was not in issue, and no evidence as to value was offered except to determine the jurisdiction of the court; third, that the plaintiff elected to take judgment only for the recovery of the property, and so directed the clerk; fourth, that there was no evidence of the value of the property introduced, and if there had been, defendant would have proved it to have been of little or no value. The second, third, and fourth paragraphs of the answer were stricken out. *Held*, that this action of the court was correct, as on such motions special pleadings are not contemplated, and the disposition of the motion is to be summary, and the defendant cannot controvert the facts already found and entered upon the record. It might have been proved by competent evidence, that the plaintiff had, at the time the judgment was entered, elected to take it in the form in which it was written, and so directed the clerk; such proof would have defeated the motion.....*Ibid.*
6. *Pleading.—Trial Without Reply to Affirmative Answer.—Judgment Non Obstante Veredicto.*—Where a paragraph of an answer alleged payment, and another paragraph contained a set-off; and upon a demurrer being overruled to each paragraph, the entry of the clerk was as follows, "to which ruling the plaintiff excepts and files his reply in these words:" entitling the cause, "The plaintiff denies each and every allegation therein contained;" signed by attorneys for the plaintiff as such; and a trial by jury resulted in a finding for the plaintiff, and the jury in answer to interrogatories stated the amount due plaintiff and the set-off allowed; and the defendant thereupon moved for a judgment *non obstante veredicto*, because there was no sufficient reply to the answers; and the court sustained the motion and rendered judgment on the set-off for the defendant, without exception by the plaintiff; *Held*, that the paper filed did not

- amount to a reply, but the defendant, having gone to trial without moving for a judgment on the pleadings and without objection, waived a reply, and the court should have entered judgment on the finding for the plaintiff. *Train, Ex'r, v. Gridley*....241
7. *Same.—Bill to Review Judgment.* Where a bill was subsequently filed to review this judgment, the complaint alleging the above facts; *Held*, on demurrer, that the complaint was insufficient, as it showed no exception to the action of the court in rendering judgment for the defendant.....*Ibid.*
8. *Trial by Court.—Motion for New Trial.—Judgment.*—Where a jury has been waived, and there has been a general finding, and an oral motion for a new trial has been made by the party against whom the finding has been made, the court cannot set aside the finding and enter a general finding for the other party and render judgment thereon. *Wright et al. v. Hawkins*264
9. *Interrogatories to Jury.—Venire de Novo.*—Where a general verdict is returned, and the answers to special interrogatories, also returned, are not signed by the foreman, and the jury is discharged without objection, it is too late for a motion for a *venire de novo*, for that omission. *Vater v. Lewis*.....288
10. *Open and Close.*—Where the plaintiff, under the issues, has anything to prove in the first instance, in order to entitle him to recover; or where he is required to prove his damages in cases where the damages cannot be ascertained by mere computation, he is entitled to open and close. *The B. & O. R. R. Co. v. McWhinney et al.*.....436
11. *Demurrer.—Amendment.—Waiver.*—The filing of an amended pleading, after a demurrer has been sustained to the original, is a waiver of any error in the ruling on the demurrer. *Earp v. The Commissioners of Putnam Co. et al.*.....470
12. *Withdrawal of Pleading.*—When an answer has been filed and a demurrer sustained to one paragraph thereof, and a reply filed to other paragraphs, the plaintiff should take leave to withdraw his pleadings, before filing an amended complaint. *Miles v. Buchanan et al.*.....490
13. *Demurrer.—Waiver.—Transcript.*—When a demurrer has been sustained to a pleading, an amendment thereof waives any error in the ruling on the demurrer, and the original pleading is not part of the transcript. A party, to render the ruling on the demurrer available, must stand on his pleading.....*Ibid.*
14. *Submission.—Issue of Law Undisposed of.*—It is erroneous to submit a case for trial while a demurrer remains undisposed of, but the attention of the court must be called to the error by a motion for a new trial or in arrest of judgment.....*Ibid.*
15. *New Parties.—Bill of Exceptions.*—After the submission of a case for trial, a motion to admit new parties cannot be granted until the submission is set aside; and the ruling on such a motion can only be presented in the Supreme Court by a bill of exceptions.....*Ibid.*
16. *Submission Set Aside.*—After the submission of a cause, if it be discovered that an issue of law is undisposed of, the submission should be set aside.....*Ibid.*
17. *Rejection of Pleading.*—Where, on motion, a reply is rejected, the ruling should be brought to this court by bill of exceptions, to avail the appellant.....*Ibid.*
18. *Re-submission.—Waiver.*—Where parties by agreement submit a cause, which is already under submission for trial, any error in not having the former submission set aside is waived. *Ibid.*
19. *Defective Finding.—Judgment.*—Where judgment is rendered on a finding which does not cover all the issues, and no exception is taken to the form and character of the judgment when announced, and no motion is made after judgment has been rendered and entered on the order book, to correct it or set it aside, no available error can be assigned thereon in this court...*Ibid.*
20. *Affidavit.—Transcript.*—Affidavits to set aside a submission are not part of the transcript, unless made so by bill of exceptions or order of court, and directed to be certified. *Ibid.*
21. *Judgment.—New Party.*—After

- judgment, a new party cannot be made to the action except a new trial be granted.....*Ibid.*
22. *Motion for Judgment on Special Finding.*—The overruling of a motion for judgment on a special finding can be presented in the Supreme Court as an error, where the motion states the ground of the application, and the party making the motion causes his exception to the ruling to be noted on the record, and assigns the error. No bill of exceptions is required in such a case, as the record presents the question. *Campbell et al. v. Dutch*.....504
23. *Special Finding Controlling General Verdict.*—In a case where the special findings of a jury are used to control adversely their general verdict, it is required that all the facts to authorize an adverse conclusion should appear by such special findings*Ibid.*
24. *Withdrawal of Pleading.—Open and Close.*—After the jury has been sworn, it is not a matter of right for the defendant to withdraw the general issue and assume the burden of proof, with the open and close of the evidence and argument. It is within the sound legal discretion of the court to permit or refuse this, and any action by the court in such matter will not be error in an ordinary case. *Mason et al. v. Seitz*.....516

PRINCIPAL AND AGENT.

See CONTRACT, 1 to 5; CORPORATION, 2; STATUTE OF LIMITATIONS, 2.

Purchase by Agent on his own Account.—Excessive Advancements.—The plaintiff was employed to act as the agent of the defendant in purchasing, prizing, and shipping tobacco to the defendant in New York, and for that purpose the plaintiff was to open a planters' commission business in Newburgh, Indiana, and was to receive seventy-five cents on each hundred pounds of tobacco for prizing, and was to send an account of his fees, with the tobacco, to the defendant at New York, that they might be collected on sale of the tobacco and deducted, so as to require the payment of the same by the planters. The plaintiff was to devote

his time faithfully to said business, and comply with all instructions given him by the defendant, and he was to receive and was guaranteed eight hundred dollars for the season. If he could, the defendant was to extend the business to other points, and if successful in so doing, the plaintiff was to have the choice whether he would take the eight hundred dollars, or the seventy-five cents on each hundred pounds prized and shipped from Newburgh and twenty-five cents on all tobacco prized and shipped from other points. Suit was brought by the plaintiff for the eight hundred dollars for his services. Answers were filed in denial, and also alleging that the plaintiff had made excessive advances on tobacco, contrary to instructions, and had used the defendant's money in purchasing tobacco on his own account, and excited the suspicions of planters and prevented the extending of the business to other points; and that he had failed to report his fees for prizing, so that the defendant might collect the same; and a counter claim was made against the plaintiff. On the trial, the court instructed the jury, in effect, that, if the plaintiff was shown by the evidence to have entered into the contract set out, and complied with the terms of his contract, and had not elected to take the fees, he was entitled to recover; that if plaintiff purchased tobacco on his own account, he was not entitled to the profits thereon, unless expressly agreed to by defendant; that if the terms of the agreement prohibited the plaintiff from purchasing tobacco on his own account, he could not maintain the action, unless the defendant consented to such purchase, if he suffered injury therefrom; and that if plaintiff had exceeded the limit authorized in making advances on tobacco, he could not recover.

Held, that the defendant could not complain of the instructions. *Ackernburgh v. McCool*.....473

PRINCIPAL AND SURETY.

See JUSTICE OF THE PEACE, 1.

Suretyship.—Issue.—Where no pleading raises the question of suretyship, the

court need not make an order for the levy of the execution first on the property of the principal. *Riley et al. v. Butler*.....51

PROCESS.

See JURISDICTION.

PROCHEIN AMI.

See PARTIES, 4, 5; PRACTICE, 3.

PROMISSORY NOTE.

See PARTIES, 1; TOWNSHIP TRUSTEE, 2.

1. *Assignee.—Judgment.—Parties.—Notice.*—In an action by the assignee of notes given for purchase-money of real estate, against the maker, there cannot be given in evidence a judgment enforcing the lien of a former vendor, in a suit, commenced after the assignment of the notes, against the maker and his immediate vendor, to which the assignee was not a party. *Fordice et al. v. Hardesty et al.*.....23
2. *Assignment by former Partner in Firm Name as Collateral for Personal Debts.*—A. and B., partners, sold partnership property which they owned equally, to C., for \$5,200, and dissolved partnership. B. received afterward from C. \$2,550, and one promissory note for \$1,050, and one for \$1,100, to the order of the late firm, in their partnership name, and A. received from C. \$550; B. subsequently purchased property for \$7,000, and A. and one D. became his security for that sum. B., to secure D. as his surety, assigned, in the name of the late firm, the two notes received from C., without A. consenting to said transfer. In a suit by A. to collect his share in the two notes so assigned, to which suit B., C., and D. were defendants, and in which D. by cross complaint against A. and C. demanded a recovery on the notes held by him;
Held, that A. was entitled to judgment against C. for \$2,075, and interest from the date of sale of the partnership property; and that D. was entitled to judgment against C. for the amount remaining due on the notes

executed by C. and crediting the amount recovered by A. *Curry v. Burnett et al.*.....102

3. *Contract.—Set-off.*—When a promissory note negotiable under the statute is executed, and subsequently the payee of the note makes a written agreement that he will accept as payment upon the note any legal claims against him that the person who has executed the note may obtain, such agreement does not in any manner change the rights of the parties. *Goldthwait et al. v. Bradford*.....149
4. *Assignment.*—After notice to the payor of an assignment of the note to a third party, he cannot, by subsequent purchase of claims against the original payee of the note entitle himself to a set-off against the holder.....*Ibid.*
5. *Pleading.—Admission.—Estoppel.* *Designation.*—In a suit on a promissory note payable to the order of A., "treasurer of the I. M. B. Co.," the complaint alleged that the note was made to the treasurer of the Indianapolis Machine Brick Company, and no denial was filed to the complaint.
Held, that the averment must be treated as admitted; and that the defendant having contracted with the corporation was estopped to deny its existence.
Held, also, that the word "treasurer" in such note was not simply a description of the person, but of the office he held in the corporation. *Vater v. Lewis*.....288
6. *Alteration.—Burden of Proof.*—In an action on a note negotiable by the law merchant, where the defendant alleges an alteration of the note after he had signed it, if there be no indication of such alteration appearing on the face of the note, the burden of this issue is upon the defendant. *Meikel v. The State Savings Institution of Chicago*.....355

R

RAILROAD.

1. *Fencing Road.—Liability.*—A railroad company is not required by the statute to fence its road, where such fencing would result in cutting itself off from the use of its own land, or

- leased property, or buildings, or wood-sheds, although the buildings or sheds may not be in present use; and if cattle are killed at such a point by the cars of the company, it is not liable, unless there is proof of negligence or want of care or skill on the part of the persons operating the train. *The Jeff., Mad., & Ind'polis R. R. Co. v. Beatty*.....15
2. *Injury to Animals.—Fences.—Cattle-Guards.*—The fencing of a railroad contemplated by the statute of March 4th, 1863, providing compensation to the owners of animals killed or injured by the cars, etc., of a railroad company, includes the putting in of proper cattle-guards to prevent animals from passing from streets and highways upon the railroad track on each side of said streets and highways. *Pitts., Cin., & St. L. R. R. Co. v. Ehrhart*.....118
3. *Tax.—Notice.—Appropriation.*—The notice given by the auditor of the county, under the act of May 12th, 1869, authorizing counties and townships to aid in the construction of railroads, must specify the sum to be appropriated; otherwise the election and all subsequent proceedings will be void. *Crooke v. The B'd of Comm'rs Daviess Co*.....320
4. *Injury to Animals.—Fence.*—In an action to recover the value of a horse killed by the cars of a railroad company, the court instructed the jury that the company would be liable, if the horse was killed at a point on the road not securely fenced, and where it could have been fenced without interfering with the rights of the public.
Held, that the instruction was not erroneous. *The C., C., & I. R. W. Co. v. Crossley, Ex'r*.....370
5. *Same.—Release.—Partition Fences.* The release of a right of way through his lands by the plaintiff in such an action, and the building of fences along the line of the railroad through the lands by the railroad company, and the use of the fields adjoining for pasturage by the plaintiff, relying on the fences for protection to his cattle, will not make the fences partition fences which the plaintiff would be bound to keep up.....*Ibid.*
6. *Same.*—A land-owner released to a railroad company the right of way through his land, and further released and relinquished to the company "all damages and rights of damages, actions and causes of action, which I might sustain or be entitled to by reason of anything connected with, or consequent upon, the location or construction of said work, or the repairing thereof when finally established or completed."
Held, that said release in no manner related to actions for damages for the injury or destruction of cattle by the running of cars along the railroad.....*Ibid.*
7. *Same.—Pleading.*—In a suit against two railroad companies, the complaint charging that a horse was killed on the road of one of the companies, where the track was not securely fenced, by the cars of the other company, passing over the road in charge of the officers of the latter company;
Held, that the averments were not sufficient to charge either company with liability under the statute, as the railroad corporation owning the track was not shown to have authorized the use of its road; nor was the company owning the cars alleged to have been controlling or running the road in the corporate name of the corporation owning the road, either as lessees, assignees, receiver, or otherwise. *The Cincinnati & Martinsville R. R. Co. et al. v. Paskins*.....380
8. *Freight.—Demurrer.—Parties.*—In an action to recover from a railroad company the value of flour delivered to a combination of railroad companies, which divided freights *pro rata* among themselves, according to the length of each road, of which combination the railroad company sued was a member, and received the flour when it reached the line of its road, and transported the same to its destination, and refused to deliver it, on demand, to the plaintiff;
Held, that a demurrer to the complaint for want of sufficient facts did not present the question whether the other railroad companies united with it in the receipt and transportation of the flour and freight generally, were partners and proper parties with it as

- defendants to the action. *The B. & O. R. R. Co. v. McWhinney et al.*.....436
9. *Bill of Lading.—Loss.—Value.*—The bill of lading stipulated that "in the event of the loss of any property," etc., "the value or cost of the same at the point and time of the shipment is to govern," and that the company in such case was to have the benefit of any insurance on the property lost.
Held, that the delivery of the flour at the point of destination to a wrong person, was not a loss within the intent of the bill of lading, and the proof of value was not therefore limited to the point of shipment.
Ibid.
10. *Trespass to Land.—Appropriation.*
Appeal.—In an action for trespass to land and for an injunction, the defendant answered, that he was acting in behalf of a railroad company that had filed her maps and surveys in the office of the clerk of the circuit court, and had afterward filed in said office her instrument of appropriation and served a copy on the plaintiff, and had applied to the circuit court for the appointment of appraisers, who had been so appointed and had appraised the damages to the land of the plaintiff through which the road passed; that the damages had been tendered to the plaintiff and afterward paid into court; and that afterward, within the ten days allowed by law, the plaintiff had filed his exceptions to the award of the appraisers which were still undetermined. On the application for a temporary injunction, the court granted the same, upon the affidavit of the plaintiff that no attempt had been made by the company to purchase from him before condemning.
Held, that the filing of the instrument of appropriation and service of a copy were jurisdictional facts which must have been passed upon in favor of the railroad company when the court assumed jurisdiction of the subject-matter, and its action could not thus be questioned collaterally.
Held, also, that the plaintiff, having appeared to the proceedings to appropriate his property, and filed his exceptions, and taken his appeal, could not, while those proceedings
- were pending, seek another remedy by injunction or otherwise. *Ney v. Swinney*.....454
11. *Same.—Appropriation.—Appraisal.*—Where a railroad company has, without the consent of the owner, and without color of title, entered upon land and occupied the same, building a depot and hotel thereon, and afterward seeks to appropriate the land under the authority of law, the value of the land at the time of the legal appropriation, with the improvement thereon, constitutes the amount for which the company is liable to the owner of the land. *Graham v. The Connorsville, etc., R. R. Co.*.....463

REAL ESTATE, RECOVERY OF.

See EXECUTOR AND ADMINISTRATOR,
 1, 2.

1. *Contract of Purchase.*—In an action for the possession of real estate, the defendant answered, that on the 15th day of March, 1863, he purchased the land in controversy from A., who resided, as did also the defendant, in the State of New York; that the conditions of the purchase were, that the defendant was to go to Indiana and examine the land, and if he was pleased with it, he was to take it at two thousand dollars, having sufficient time to make the money from the land, paying in the interval interest annually at the rate of seven per cent.; that after a sufficient amount was paid to secure A., defendant was to receive a conveyance and execute a mortgage for the balance of the purchase-money; that defendant entered into possession of the land under said contract, and has ever since remained and still continues in peaceable possession of the same, and has made lasting and valuable improvements on the same; that afterwards, about July, 1865, A. conveyed the land to B., who had full knowledge of defendant's purchase and possession and took said deed only to aid defendant to carry out his contract, and with the agreement that he, said B., would pay the money to said A. for defendant and hold the land on the same conditions that it had been held by A. under his

contract with the defendant, receiving one hundred and twenty dollars for his trouble and interest on the entire sum advanced by him, until repaid by defendant; that B. did so advance the money due A., being twenty-two hundred and eighty dollars, and on the 6th day of November, 1866, received under said agreement and as interest, one hundred dollars, and on the 26th day of November, 1867, two hundred dollars as such interest, and on the 30th day of March, 1868, seventy-eight dollars and eighty-five cents as further interest; and said B. has never demanded the payment of the principal, but on the 25th day of June, 1868, the defendant tendered to B. five hundred dollars as payment on the principal, which B. refused; that defendant has been ever since and now is ready to comply with his contract; that at the time of the conveyance to B. the land was worth four thousand dollars; that on the 8th day of May, 1868, B. conveyed the land to C., the plaintiff, who had full knowledge of all the facts, and who executed a mortgage to B. for two thousand two hundred and seven dollars and fifty cents; that said land is worth six thousand five hundred dollars; and defendant asked that B. should be made a party, and on payment of the sum due him according to the contract, should convey the land to the defendant, and that the deed to C. and mortgage to C. be declared void.

Held, that the answer was sufficient.

Church v. Cole.....34

2. *Same.—Mortgage in Equity.*—The defendant filed a second paragraph of answer, alleging that in July, 1865, he was indebted to A. in the sum of two thousand two hundred and eighty dollars, as purchase-money for the said land, for which he had received no deed; that B. agreed to and did advance by way of loan to the defendant said sum, and defendant paid the same to A., who thereupon executed a deed of conveyance to B., who agreed to hold said title as a mortgage to secure his loan to the defendant, and agreed to receive interest upon said sum and one hundred and twenty dollars for his trouble and to give

reasonable time to defendant to pay said sum so advanced, or to sell said land to raise the money to repay said loan; that he subsequently received said payment for his trouble and various sums as interest; and defendant, on the 25th day of June, 1868, tendered to B. five hundred dollars, as a payment, which he refused to receive, and executed a deed to C., who had full knowledge of all the facts; and defendant prayed that the deed might be declared void, and a conveyance by B. to the defendant ordered on payment of amount due from defendant.

Held, on demurrer, that this paragraph was good.....*Ibid*.

3. *Same.—Trust.*—A third paragraph alleged the contract of purchase from A.; that B. took the title as a trustee for the defendant, and received payment for his trouble and interest on the money advanced; and that he conveyed to C., who had full knowledge of the trust.

Held, that this paragraph was good on demurrer.....*Ibid*.

4. *Uncertain Description.—Evidence.*

In a suit to recover a part of ten acres of land off of the east side of the south-east quarter of section thirty-four in township thirty-six, north of range eleven east, in Ripley county, Indiana;

Held, that the plaintiff should not be permitted to introduce in evidence, to show his paper title, a deed conveying "ten acres off of the south-east side" of the quarter section described.

Buchanan v. Whitham.....257

5. *Same.—Oral Evidence.*—Where the plaintiff in a suit to recover real estate has been permitted to give oral evidence of his possession and adverse title to the land, the same privilege should be accorded to the defendant.....*Ibid*.

RECEIVER.

See INSURANCE, I.

Suit against Assignee.—Statute.—Action by a receiver against the assignee, under an assignment for the benefit of creditors, of a judgment debtor, to recover damages resulting to a judgment creditor for the failure of

the assignee to properly discharge his duty under the trust.

Held, that the action could only be sustained at the suit of the party injured, or his assigns.

Held, also, that the 205th section of the code (2 G. & H. 153) only authorizes the court to empower the receiver to bring suit where the party whose effects he receives could have brought the action, save, perhaps, in exceptional cases. *La Follett v. Akin*. I

RECORD.

See BILL OF EXCEPTIONS; PRACTICE, 20; SUPREME COURT, 8, 9, 10, 11.

REDEMPTION.

Pleading.—A bill to redeem is not good in equity unless it contain a formal offer to pay whatever sum may be found due upon taking the account. *Kemp v. Mitchell et al.*....249

RELEASE.

See RAILROAD, 5, 6.

REPLEVIN.

See PRACTICE, 4, 5.

Practice.—*Verdict*.—*Damages*.—On the trial of an action of replevin to recover eighteen hogs, the jury returned the following verdict: "We, the jury, find the property replevied to be the property of the plaintiff, and assess his damages at twenty-five dollars, and assess his damages for the detention thereof at twenty-five dollars. GEORGE RIDGE, Foreman." "We, the jury, find the nine hogs not replevied to be the property of the plaintiff and are of the value of ninety-five dollars, and assess his damages for the detention thereof at ninety-five dollars. GEORGE RIDGE, Foreman."

Held, that the verdict was sufficient; that it would have been better to have embraced the entire finding in one verdict, but the informality would not vitiate, and a motion for a *venire de novo* was properly overruled.

Held, also, that the plaintiff was entitled to damages for the time neces-

sarily spent and expenses incurred in hunting for his hogs. He was also entitled to compensation for any deterioration in the value of his property while in the hands of the defendant. *Mitchell v. Burch*.....529

REPLY.

See PRACTICE, 6.

RESULTING TRUST.

See FRAUD, 3; TRUST, 1.

S

SEAL.

Transcript. *See* SUPREME COURT, 7.

SEDUCTION.

See CONTEMPT, 8; PARTIES, 5.

SET-OFF.

See PROMISSORY NOTE, 3, 4.

SHERIFF'S SALE.

See GUARDIAN AND WARD, 1; MINOR; VENDOR AND PURCHASER, 2.

SINKING FUND.

Mortgage.—*Sale by Mortgagor after Property was Bid in by the State*.—*Purchase from the State*.—*Adverse Possession*.—*Favored Purchaser*.—*Warrant for Possession*.—*Occupying Claimants*.—Certain real estate was mortgaged to the Sinking Fund of the State of Indiana, in 1854, and on default in the payment of interest and principal in 1862, was bid in by the State, and A., the mortgagor, subsequently sold the property to B. and executed a deed for the same on the 3d day of June, 1869, he and his said grantee remaining in possession of the property to the present time; and on the 5th day of June, 1869, the Auditor of State sold and conveyed the property to C., who gave notice to B. to surrender the premises, and on his failure to do so, procured a warrant from the Auditor of State, directing the sheriff of the county, where the land was situated, to put

C. in possession, and B. thereupon applied for an injunction, alleging that he had made valuable improvements on the land, and had been in adverse possession of the same when the sale was made by the Auditor.

Held, that the possession of the mortgagor and of his grantee was not adverse.

Held, also, that the right of a grantee from the mortgagor to be favored in the purchase only continued for six months after the land was bid in by the State, and the decision of the Auditor among such applicants to purchase was final.

Held, also, that the warrant issued by the auditor was authorized by law.

Held, also, that the statute on the subject of "occupying claimants" has no application to this case, and the mortgagor or his grantee can claim no benefit from the same. *Vannoy et al. v. Blessing et al.*.....349

SLANDER.

1. *Pleading.—Malice.*—In an action for slanderous words spoken of the plaintiff, it is a sufficient charge of malice to aver that "the defendant spoke, uttered, and published the false, scandalous, malicious, and defamatory words following." *Keeling v. McCall*.....321

2. *Actionable Words and Prefatory Matter.*—Where the plaintiff lived near to and north of the defendant, and the defendant said in regard to some wheat stolen the night before, in answer to a question as to which way the wheat stolen went, "I think it went north. Tom McCall" (the plaintiff) "was here twice the day before, to get seed wheat. He inquired whether it was clean enough to sow without being cleaned again. Now I don't want anything to go out from me, that I said Tom McCall stole the wheat, for I don't know who stole it, but it looks suspicious," it was held that the words were actionable, taken with the prefatory matter. So also were the words, "I saw the man steal my wheat, and saw the way he went; he went across the field north, and it was nobody but Tom McCall.".....*Ibid.*

3. *Same.*—Where there had been a

difficulty between the plaintiff and defendant, that still caused ill feeling, and defendant said, "The wheat did not go very far. I would not doubt that it went across the field" (nodding his head toward plaintiff's).

"It looks very suspicious that it went that way, for me and him are not very good friends;" the words were, with the extrinsic facts, held sufficient; also the words, "Tom McCall is the man, and nobody else, that stole my wheat. I saw the man who took it, and can't be mistaken.".....*Ibid.*

4. *Names.—Averments.*—Where it was alleged that the plaintiff in that neighborhood was known by all the community as "Walnuts," and as "the man who deals in walnuts," and the words used were, "I know the man who took my wheat; I know all about it. I saw him take it. You all know him. It is the man they call Walnuts;" and again these words: "The man who trades in walnuts stole my wheat;" and again these words: "The man who trades in walnuts took my wheat;" and it was not alleged that the persons to whom the words were spoken knew the plaintiff by these names or that they lived in the neighborhood, but that they were "divers good and worthy persons of the county," the words, with the averments, were held not sufficient to sustain an action.....*Ibid.*

5. *Evidence.—Impression.*—Under the allegation that the words, "me and him are n't very good friends," were used, it was proper to introduce proof of a difficulty between the parties, to identify the one of whom they were uttered. So a question to a hearer as to the impression made on his mind by the words was proper, to obtain the opinion, understanding, or belief of the witness as to the person of whom the words were spoken.

Ibid.

SPECIAL FINDING.

See PRACTICE, 22, 23.

SPECIFIC PERFORMANCE.

See CONTRACT, 10; VENDOR AND PURCHASER, 2, 3.

STATE.

Claim against. See ACTION.

Purchase from. See SINKING FUND.

STATE BOARD OF EQUALIZATION.

1. The State Board of Equalization of 1869 was illegal in its construction, or organization; and in consequence thereof, its acts were illegal and void. *Shoemaker v. Board of Comm'rs of Grant Co. et al.*.....175
2. *Same.*—*Action.*—*Parties.*—*Injunction.*—Although the order made by the State Board of Equalization in 1869, directing twenty per cent. to be added to the valuation of real estate in Grant county was illegal and void, and the tax arising from this illegal addition has been paid into the State treasury; an action cannot be maintained by the Board of Commissioners of Grant county jointly with a tax-payer of said county, to have the county treasurer restrained from paying into the State treasury a like sum of legal taxes subsequently collected, and to have him retain the same in his hands for the plaintiffs.....*Ibid.*
3. *Same.*—If it had been alleged and shown that said tax payer owned taxable real estate, and had paid his taxes for 1869, and that he had a common and general interest with many persons, or that the parties were numerous, and that it was impracticable to bring them all before the court, then he might have maintained an action for himself and for the benefit of the whole in a case where the facts entitled them to relief.....*Ibid.*
4. *Same.*—*Board of Commissioners.*—If money was illegally collected from the owners of real estate in Grant county, by reason of an illegal order made by the State Board of Equalization, it belongs to the owners of the real estate, and not to the board of commissioners of said county. The board of commissioners cannot maintain an action for the money, in their official and corporate capacity, unless the money, if collected, would belong to the county.

Ibid.

STATE TREASURY.

See TAX, 1 to 4.

STATUTE OF FRAUDS.

See VENDOR AND PURCHASER, 3.

STATUTE OF LIMITATIONS.

See EXECUTOR AND ADMINISTRATOR, 1, 2, 3.

1. *Pleading.*—Where a statute of limitations contains exceptions, it must be pleaded, to avail the defendant, unless the complaint on its face shows that the plaintiff is barred, notwithstanding the exceptions. *Potter et al. v. Smith et al.*.....231
 2. *Agent.*—*Misrepresentation.*—*Concealment.*—An action was brought in 1870 by A. against B., the complaint alleging that B. had, in the year 1848, falsely represented himself to A. as the agent of C., to whom A. was indebted on a promissory note, and as such agent had received from A. the money due C. and promised to pay the same to C. and take up and destroy the note; but that B. had retained the money himself, and A. had only discovered the fact about the time of the bringing of the suit; and B., in answer, pleaded the statute of limitations, to which A. replied, that he paid the money to B. on his claim that he was the agent of C., and believing him to be such agent, and authorized to receive the same, when, in fact, he was not such agent nor had such authority, but concealed such fact from A. and promised to pay the same over as such agent, which he failed to do, and by reason of such concealment A. did not discover the cause of action until in the fall of 1869.
- Held*, that the reply was insufficient to avoid the statute; that the concealment was all previous to the accruing of the cause of action, and something more is required to avoid the statute than mere silence after the action accrues. *Stanley v. Stanton.*.....445

STATUTES CONSTRUED.

See RECEIVER, 1; TAX, 3, 5.
Witness. See HEIRS, 3.

Statute of Limitations. See EXECUTOR AND ADMINISTRATOR, 3.

STREET.

See CITY; DEDICATION; TOWN.

SUBDIVISION.

See PRACTICE, 14, 15, 16, 18, 20.

SUBROGATION.

See VENDOR AND PURCHASER, 1.

SUBSCRIPTION.

See TURNPIKE, 5.

1. *Consideration.—Corporation.—Trustee.*—In a suit upon a subscription of money to the North-western Conference of Universalists, for the purpose of establishing a school in Indiana, to be under the control and patronage of the Universalist church of said State, alleging that the same was due and that expenses had been incurred on the faith of its payment; *Held*, that sufficient consideration was shown to support the promise, and that the location of the school was not a condition precedent to the payment of the subscription.
- Held*, also, that the North-western Conference of Universalists could sue without alleging generally that they were a corporation, or showing facts making them a corporation.
- Held*, also, that this body could sue as the trustee of an express trust. *The N. W. Conference of Universalists v. Myers et al.*.....375
2. *Administration. — Suit against Widow and Heirs.*—The action was brought against the widow and heirs of the subscriber, and the complaint alleged that the decedent had left five thousand dollars in real estate and personal property, and that there had been no administration.
- Held*, that the action could not be sustained against the widow and heirs*Ibid.*

SUMMONS.

See PRACTICE, 1; SUPREME COURT, 11;

SUNDAY.

Estoppel.—Admissions which would otherwise operate as an estoppel, if acted upon, are not rendered inoperative because made on Sunday, no contract being then completed. *Riley et al. v. Butler*.....51

SUPREME COURT.

See APPEAL; COSTS, 1; MANDATE, 1; PARTITION, 1.

1. *Presumption.—Examination of Witnesses.*—The Supreme Court will presume—the contrary not being shown—that there was a good reason justifying the court below in allowing plaintiff's witness to repeat, after the close of the defendant's evidence, what he had previously sworn to. *Rhodes et al. v. Green et al.*.....7
2. *Exceptions.—Evidence.*—The Supreme Court will not consider general objections to the introduction of evidence where no particular grounds are pointed out.....*Ibid.*
3. *Assignment of Error.—Sufficiency of Complaint.—Jurisdiction.*—The want of sufficient facts in a complaint to constitute a cause of action, or the fact that the complaint shows the court had no jurisdiction over the subject-matter of the action, may be assigned as error in the Supreme Court, although no demurrer was interposed in the lower court. *Riley et al. v. Butler*.....51
4. *Same.—New Trial.*—A cause for a new trial not presented in the court below cannot be considered in the Supreme Court.....*Ibid.*
5. *Jurisdiction.*—Jurisdiction cannot be conferred upon the Supreme Court by consent; nor can this court, by taking and exercising jurisdiction in a cause where the right of appeal does not exist, acquire jurisdiction so as to give the force and effect of a decision to its ruling. *Davis et ux. v. Davis et al.*.....160
6. *Appeal.—Jurisdiction of Courts.* The power and jurisdiction of the courts of this State are fixed and determined by the law of their creation, and the right to appeal from an inferior court to the Supreme Court is prescribed by the code. The right to appeal confers on the Supreme Court the power to review the judg-

- ment appealed from, if the appeal has been perfected according to law and the rules of court. *Whittem v. The State*.....196
7. *Transcript.—Seal of Court.*—A paper purporting to be a transcript of a record, without the seal of the court, cannot be regarded as such in the Supreme Court. *Brunt v. The State, ex rel. French et al.*.....330
8. *Assignment of Error.—Demurrer. Record.*—Where a demurrer has been sustained to a complaint, and an amended complaint has been filed, to which a demurrer has been overruled, the ruling on the demurrer to the original complaint cannot be assigned for error, and the clerk should not certify that complaint as part of the record. *Byers v. Hickman et al.* 359
9. *County Clerk.—Record.—Costs.*—The statute forbids the clerk from certifying any original pleading, after an amended pleading has been substituted; and the Supreme Court can only examine such papers for the purpose of determining the proper person to be taxed with the costs for a violation of the statute. *Earp v. Comm'rs of Putnam Co. et al.*...470
10. *Same.*—Where one pleading is substituted for another, the clerk should not copy the original into a transcript of the record. Where the clerk is in doubt what papers form a part of the record, he should demand from the attorney for the appellant written directions, and append the same to the record, to enable the Supreme Court to tax with costs the party liable for incumbering the transcript. *Miles v. Buchanan et al.*.....499
11. *Same.—Judgment on Default.*—When the judgment is rendered upon default, the clerk should certify the summons and return, or the affidavit of non-residence and proof of publication. If the defendant appear, neither of these papers should be copied*Ibid.*
12. *Assignment of Error.*—Where it is assigned as error that the court overruled a motion for a new trial or in arrest of judgment, these assignments include all the reasons for a new trial or in arrest embraced in the motion. A ruling upon demurrer must be assigned for error. So, also, where there was no demurrer to the

complaint, and the question as to its sufficiency or as to the jurisdiction of the court is to be raised in the Supreme Court, it must be done by assigning the error upon the record. *Ibid.*

T

TAX.

See CITY, 7; RAILROAD, 3; STATE BOARD OF EQUALIZATION.

1. *Illegal Tax.—State as Trustee.*—If an illegal tax is collected and paid into the State Treasury, the State holds it in trust for the persons who paid it. If the money was collected by the sale of the tax payer's property, or was paid under protest, to avoid such sale, the State becomes the legal trustee; but if it was voluntarily paid, and not under protest, the State then becomes the equitable trustee. *Shoemaker v. The Board of Comm'rs of Grant Co. et al.*...175
2. *Same.—Creditors of the State.*—If an illegal tax has been paid, and it has gone into the State treasury, the persons paying the tax are the creditors respectively of the State to the amount of illegal tax which each has paid, and like other creditors of the State, their remedy is to ask the law making power to make the proper appropriations*Ibid.*
3. *Same.—Statute Construed.*—Sections 120 and 121, 1 G. & H. 101, were intended to meet and provide for individual and occasional instances of erroneous charges and miscalculations, and were not intended to apply to and govern a case where an illegal tax has been assessed against almost the entire body of tax payers in a county*Ibid.*
4. *Same.—Injunction.—Voluntary Payment.*—Persons who have illegal taxes assessed against them may enjoin the collection of the same. If they fail to do so, and voluntarily pay the same, their only remedy is an appeal to the justice of the law making power*Ibid.*
5. *Indian Reservation.—Statute.*—The lands reserved by the treaty between the United States and the Miami Indians, in 1838, to the band of Ma-to-sin-ia, and referred to in the

treaty of 1840, in which the United States agreed to convey by patent said lands to Me-shing-go-me-sia, in trust for his band, and the personal property of said band are not liable to taxation for state, county, and other purposes. Nor are these lands included in the ninth section of the act of June 21st, 1852, 1 G. & H. 70. *Me-shing-go-me-sia et al. v. The State et al.*.....310

TITLE.

See CONTRACT, 11; COSTS, 1.

TORT.

Contract. — Pleading. — Evidence.—Where suit is brought on a contract, an answer alleging damages sustained by the defendant from a tort committed by the plaintiff is subject to a demurrer; but if an issue of fact be made on the answer, proof should be admitted to support its averments. *Roback et al. v. Powell*.....515

TOWN.

See CITY, 1, 2; DEDICATION.

1. *Street Improvement.—County Commissioners.—Appeal.*—The contractor for the improvement of a street bordering on a public square in a town, upon receiving an estimate for work done, may present his claim therefor in the form of an account against the county, to the board of commissioners, who have the power to allow it; and if payment is refused, he may either appeal from the action of the board to the circuit court, or bring an action against the county. *Board of Comm'rs of Blackford Co. v. Shrader*87
2. *Same.—Pleading.—Evidence.*—It is not necessary that the account so presented should state that all the steps required by law to make a valid assessment were taken, but evidence thereof can be introduced on the trial on appeal.....*Ibid.*
3. *Same.—Lowest Bidder.—Evidence.*—The evidence, in such trial on appeal, is not insufficient, merely because it does not show the contract to have been given to the lowest bidder..*Ibid.*

4. *Same.—Construction of Statute.—Question of Fact.*—Who is the lowest bidder, is a question of fact arising prior to the making of the contract, and, under the statute, cannot be inquired into on the trial of the action for work done.....*Ibid.*

5. *Same.—Trustees of Town.—Petition.—Public Square.*—To render a county liable for the improvement of a street around a public square, made by order of the board of trustees of a town, it is not necessary that a petition for such improvement be filed. *Ibid.*

TOWNSHIP TRUSTEE.

1. *Title to Money in his Hands.*—A township trustee is not a mere bailee of the money that comes into his hands by virtue of his office. He is liable to account for and pay it over, whether the same be stolen or burned without his fault, or loaned out. The legal technical title to the money in his hands is in himself. *Rock et al. v. Stinger*.....346
2. *Promissory Note.—Defence.*—In an action upon a promissory note, an answer that the money forming the consideration for the note was township and school money, coming into the hands of the plaintiff by virtue of his office as township trustee, and unlawfully loaned by him to the defendant, and that since said loan the plaintiff had vacated his office, constituted no defence to the suit. *Ibid.*

TRANSCRIPT.

See PRACTICE, 13, 20; SUPREME COURT, 7, 9, 10, 11.

TRESPASS.

See RAILROAD, 10, 11.

TRIAL BY COURT.

See COSTS, 2.

TRUST.

See REAL ESTATE, RECOVERY OF, 3; SUBSCRIPTION, 1; TAX, 1; VENDOR AND PURCHASER, 2.

Resulting Trust. See FRAUD, 3.

Resulting Trust.—Mortgage.—Merger.

Where a third party pays the purchase-money to the grantor for the grantee of lands at the time of the conveyance, upon a parol agreement, without fraudulent intent, with the grantee, that the grantee shall hold the land in trust, as security for the repayment of such money to such third party, a resulting trust arises in favor of such third party and against the assignee of a judgment who is the purchaser of said land at sheriff's sale on execution issued upon said judgment rendered against said assignee, prior to the said conveyance and payment of money, and who before the assignment of the judgment had full knowledge of said agreement and payment of money. But if, after said payment by said third party, and the agreement between him and the grantee, said third party receives the note of the grantee, and a mortgage on said land, as security for the purchase-money so paid by said third party, he thereby converts the equitable estate he held in the land, not into an express trust, but into a mere debt secured by mortgage, and subject to the lien of the prior judgment. *Milliken et al. v. Ham*.....166

TURNPIKE.

See CORPORATION, 1.

1. *Organization of.*—Gravel road companies are organized under the act of May 12th, 1852, 1 G. & H. 474. The act of 1867 on the same subject was an amendment of the former law, and was repealed by the act of 1869, reserving, however, certain rights. *Lincoln et al. v. The State, ex rel. Wood et al.*.....161.
2. *Vote.*—All persons who acquiesce in assessments and become thus liable to pay toward the construction of the road, are entitled equally with subscribers to vote, one vote for each portion of the amount assessed equal to a share of stock; nor is the payment of the assessment necessary to entitle the person assessed to vote...*Ibid.*
3. *Same.—Appeal.*—The party who appeals from an assessment cannot vote pending such appeal.....*Ibid.*

4. *Articles of Association.*—The articles of association of a gravel road company were held to be not invalid because the amounts subscribed might be paid in instalments of one, two, and three years, commencing with the year 1868, either in money or labor, and at such times in each year as the directors might determine. *Vansickle et al. v. Erdelmeyer*....262

5. *Articles of Association.—Stock Subscription.—Length of Road.*—Where an information was brought to inquire by what authority the defendants claimed to be a corporation under the name of a turnpike company, and it was alleged that the road, for the construction of which the corporation attempted to organize, was six miles and three-quarters in length, and the stock subscribed was only three thousand dollars; *Held*, on demurrer, that the complaint was sufficient. *The State, ex rel. O'Brien, v. Dillon et al.*.....388

U

UNSOUND MIND.

See WILL, 1 to 8.

V

VENDOR AND PURCHASER.

See FRAUD, 1, 3, 4, 5; PROMISSORY NOTE, 1; REAL ESTATE, RECOVERY OF, 1, 2, 3; SINKING FUND.

1. *Vendor's Lien.—Purchase-Money. Subrogation.—Defeasance.*—A. and B. were the owners, as tenants in common, of real estate, for which B. had paid all the purchase-money; A. and B. united in a conveyance of said real estate by warranty deed, to a purchaser, C., who executed to each owner notes for one-half the price; B., at the time of the execution of said deed to C., notified C. that he had paid all the purchase-money for said real estate, and held a lien for the payment of one-half thereof on the half conveyed by said deed by A. to C., and would hold C. liable therefor; C., on the same day the deed and notes were executed, assigned the notes to D., and on the following day B. commenced suit

against A. and C. and afterward obtained judgment against A. for one-half the price of the land, and a decree as to A. and C., enforcing the lien of B. on the land; C. afterward paid the judgment.

Held, that said facts were not sufficient to bar an action by D. against C. on the notes made by him to A. and assigned to D.

Held, also, that though B. might be subrogated to the rights of the vendor of himself and A. as to the undivided half held by A., yet, as against his unconditional deed, in fee simple, of warranty, he could not reserve such lien.

Held, also, that though B. and A. were also partners, and the real estate was owned by them as such, and B. would hold a lien thereon (as against A.) for the ultimate balance due him on a settlement of the partnership accounts, yet he could not set up such lien in opposition to said deed. *For-dice et al. v. Hardesty et al.*.....23

2. *Sheriff's Sale.—Trust.—Specific Performance.*—A complaint to compel a conveyance of real estate based the right of the plaintiff to such relief upon two grounds: first, that A., whose executors, widow, and heirs were the defendants, having purchased said real estate at sheriff's sale upon executions against the plaintiff, agreed with the plaintiff at the time of the sale to hold the land in trust for the plaintiff; second, that the plaintiff had re-purchased the land in dispute from A., and had been put in possession of the same with an agreement that he should make improvements, and pay taxes, and repay purchase-money, and he had done such acts in part performance of the contract as entitled him to a decree for specific performance of the contract.

Held, that there was no sufficient allegation of a trust.

Held, also, that as a case for the specific performance of a contract for the sale and purchase of real estate, it was a good cause of action. *Pearson et al. v. East.*.....27

3. *Statute of Frauds.—Continued Possession of Real Estate.*—Upon the question, whether the continued possession of the property, the plaintiff having been in possession as

owner up to the date of the contract for the re-purchase, was sufficient—together with valuable improvements made by him upon the land after such contract; making clearings and fencing ground, worth two hundred dollars; building a barn, in value five hundred dollars; setting out fruit trees to the value of seventy-five dollars—to entitle him to a specific performance of the contract, the judges, remaining equally divided since the last term, certified a division of opinion*Ibid.*

VENDOR'S LIEN.

See PROMISSORY NOTE, 1; VENDOR AND PURCHASER, 1.

VENIRE DE NOVO.

See PRACTICE, 9.

VENUE.

1. *Change of Venue.—Clerk's Fees.—Criminal Law.*—The clerk of a county to which a criminal case is removed by change of venue is not entitled to any fees to which the clerk of the county from which the case comes would not have been entitled if the case had been tried where it originated. *The B'd of Comm'rs of Brown Co. v. Summerfield.*.....543

2. *Same.—Allowance of Claims.*—The order of the court making an allowance for expenses and claims against the county from which a criminal case has come by change of venue, is *prima facie* evidence of the amount due, in all cases where the claims are such as are recognized by law...*Ibid.*

3. *Same.—Statutes.*—Sections 99 and 100 of chapter 54, of the code of 1843, p. 1002, were continued in force by section 172, 2 G. & H. 428.....*Ibid.*

VERDICT.

See PRACTICE, 22, 23; REPLEVIN.

VERIFICATION OF PLEADINGS.

See DEMURRER, 1; PRACTICE, 3.

W

WAIVER.

See CONTRACT, 1, 2; PRACTICE, 11, 13, 18.

WIDOW.

Witness. See HEIRS, 2, 3; SUBSCRIPTION, 2.

WILL.

1. *Unsound Mind.*—Where a will was contested on the ground that the testator was of unsound mind, and the answer was the general denial;

Held, that every man is presumed to be sane or of sound mind, until the contrary is made to appear by evidence.

Held, also, that when it is shown by evidence that a man has been at one time insane or of unsound mind, the law presumes that he remains so, until it is shown by evidence that he has been either wholly or temporarily restored to sanity or soundness of mind. *Rush et al. v. Megee et al.* 69

2. *Husband and Wife.*—*Witness.*—A person who was a plaintiff and also the husband of one of the plaintiffs contesting a will was properly excluded as a witness (PETTIT, J., dissenting).....*Ibid.*

3. *Evidence.*—Where, on the trial of an action to contest a will, it had been shown that the testator, many years before the making of the will, had mysteriously left his home and gone to Kentucky and remained some time, and while there had shot himself, one of the plaintiffs, a daughter of the testator, was asked, while under examination as a witness for the plaintiffs, "What was said, if anything, to the defendants, or the family in the presence of the defendants, in relation to the absence of your father at the time he was in Kentucky?"

Held, that the question was too loose and broad to be permitted.....*Ibid.*

4. *Same.*—*Cross Examination.*—Where a witness had testified to facts and circumstances strongly tending to show that the testator was insane before the execution of the will and about the time the witness made a proposition to purchase land from him, the following question was asked the witness on cross examination: "If your proposition to purchase the land adjoining you from the testator had been accepted by him, would you have taken a conveyance from him?"

Held, that this was within the reasonable limits of a cross examination.

Ibid.

5. *Same.*—*Expert.*—A physician, an expert, was asked this question: "If at any time or times before the making of his will, the testator was the subject of a delusion on the subject of poisons, and that delusion had relation to any of his sons-in-law, then, judging from the evidence of his acts and language on that day, and from all the evidence in the case, what was his condition at the time of making his will?"

Held, that the question was not a proper one to be answered by the witness; as an expert is not to judge of the credit of the witnesses or truth of facts testified to.....*Ibid.*

6. *Same.*—*Rebutting.*—This question was asked an expert in rebutting evidence: "State whether the evidence introduced by the defendants, in connection with the evidence introduced by the plaintiffs, indicates to you that there was a lucid interval or not at the time the testator made his will."

Held, that the question was improper for the same reason as the last one."

Ibid.

7. *Same.*—A witness for the defendants, an expert, having given his opinion from all the facts, in favor of the soundness of mind of the testator, was asked on cross examination this question, warranted by the evidence: "Suppose a man start suddenly from his tea table, under an impression that some one is at his door, when there has been no sound, and the door is closed, seize his gun, making out, and afterward assert that he chased from his door a very near relative of the family, who lived close by, and that he finally disappeared from him in a cornfield; supposing him to be honest in his belief, and that no one was in fact at his door, what do you think of his mental condition?"

Held, that the question was admissible on cross examination.....*Ibid.*

8. *Same.*—*Witness.*—*Opinion.*—A witness who had testified that he had known the testator intimately for many years; that he had officiated at the marriages of all the testator's children but one; that he knew him

- in church and had been with him many times, was asked the following questions: "What impression did the facts stated by you make upon you as to the soundness of the testator's mind?" Answer: "From the facts which I have detailed there was no impression made on my mind as to the testator's sanity." Second. "From the facts stated by you, what is your opinion as to the soundness of the testator's mind?" There was no answer to this question in the record. Third. "At the time of your intercourse with the testator, what was your opinion of the soundness of his mind, judging from the facts you have stated to the jury?" Answer, "I had formed no other opinion than that he was a man of sound mind."
- Held*, that the questions were all proper.....*Ibid.*
9. *Evidence.—Opinion of Witness as to Testamentary Capacity.*—The naked opinion of a witness, not an expert, as to a testator's soundness of mind is not competent evidence. *Turner et al. v. Cook*.....129
10. *Declarations of Deceased Husband.*—The widow of a testator cannot give in evidence communications made to her by her husband during marriage.....*Ibid.*
11. *Execution of.*—It is not necessary that the testator should, at the time of executing the will, inform the subscribing witnesses that the instrument which they are to sign is a will.....*Ibid.*
12. *Same.—Subscribing Witnesses.*—The testator need not see the witnesses subscribe their names to the will; it is sufficient if the instrument is subscribed in his presence. The witnesses must know that the paper which they have subscribed is the one which the testator signed....*Ibid.*
13. *Undue Influence.*—The fact that a will made ten years prior to one being contested was procured by undue influence, should not be submitted to the jury as a circumstance against the will in controversy....*Ibid.*
14. *Proceeding to Contest a Will.—Burden of Proof.*—In a proceeding to contest a will, which has been admitted to probate, the burden of proof is on the plaintiff.....*Ibid.*

WITNESS.

See HEIRS, 2, 3; HUSBAND AND WIFE, 3; WILL, 2, 8.

Parties.—There is no law or practice that will authorize a party to have himself or herself subpoenaed as a witness to testify in his or her own behalf, and thus acquire the rights and protection that are afforded to witnesses. *Whittem v. The State*..196

END OF VOLUME XXXVI.

Exc. J. J.

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